# PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
*Petitioners*,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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May 29, 2009

## QUESTIONS PRESENTED

1. Whether, under the Federal Arbitration Act ("FAA"), courts may invalidate a commercial agreement to arbitrate claims only on an individual basis – and not on a classwide basis – upon a "showing that the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual" Sherman Act claim, even though nothing in the FAA evidences any intent by Congress to preclude parties from agreeing exclusively to individual arbitration and Congress expressly rejected adding a class action procedure when it enacted the Sherman Act.

2. Whether, under this Court's decision in *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), costs that a plaintiff would incur in either arbitration or litigation – such as expert and attorney's fees – provide a basis to invalidate a provision of an arbitration agreement providing for individual rather than class arbitration.

## LIST OF PARTIES TO THE PROCEEDINGS

Petitioners American Express Company and American Express Travel Related Services Company, Inc. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Italian Colors Restaurant; 429 Supermarkets Corp.; Bunda Starr Corp. d/b/a Buy-Rite; Chez Noelle Restaurant Corp.; Cohen Rese Gallery, Inc.; DRF Jewelers Corp.; Il Forno, Inc.; Mai Jasmine Corp.; Mascari Enterprises d/b/a Sound Stations; Mims Enterprises, Inc. d/b/a Mims Restaurant; National Supermarkets Association Inc.; and Phoung Corp. were plaintiffs in cases consolidated before the district court and appellants in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners American Express Company and American Express Travel Related Services Company, Inc. state the following:

American Express Company is a publicly traded company. It has no parent company; however, Berkshire Hathaway, Inc. owns more than 10 percent of its outstanding common shares. American Express Travel Related Services Company, Inc. has not issued shares to the public and is wholly owned by American Express Company.

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American Express Company and American Express Travel Related Services Company, Inc. (collectively, "American Express") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## INTRODUCTION

This case arises out of antitrust "tying" claims brought under Section 1 of the Sherman Act against American Express by retail merchants that agreed to accept American Express cards. The Second Circuit invalidated the portion of the parties' arbitration provision requiring claims to be arbitrated individually, rather than as a class. The Second Circuit held that the "federal substantive law of arbitrability" permits courts to invalidate agreements to arbitrate claims individually upon a "showing that the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual action." Pet. App. 40a-41a. Applying this principle, which it based on a misreading of a sentence in *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), the Second Circuit found that the costs of arbitrating the plaintiffs' antitrust claims on an individual basis – including expert fees and attorney's fees that would have been incurred equally in litigation – were prohibitive compared to the value of each plaintiff's claim.

The Second Circuit's decision warrants review because it is directly contrary to this Court's settled Federal Arbitration Act ("FAA") jurisprudence and threatens to carve an enormous exception into the FAA without any basis in that statute. This Court has clearly and consistently held that, under the FAA, arbitration agreements must be enforced "in

the manner provided for in [the arbitration] agreement," 9 U.S.C. § 4, unless "'Congress itself has evinced an intention to preclude'" such arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Nothing in either the FAA or the Sherman Act evidences any congressional intent to preclude agreements to arbitrate exclusively on an individualized basis.

When Congress passed the Sherman Act and the FAA, class actions for damages were not even permitted in federal court. In enacting those laws, Congress could not have had an "intention to preclude" parties from forgoing class arbitration when class actions for damages were not available in court. *Gilmer*, 500 U.S. at 26. And subsequent changes to the Federal Rules of Civil Procedure that permit such actions do not demonstrate any congressional determination that agreements calling for individual arbitrations should be overridden by the courts.

Moreover, when it passed the Sherman Act, Congress expressly considered and rejected a proposal to create a class action procedure for consumers with small damages under the antitrust laws. The Second Circuit's conclusion that the parties' agreement to arbitrate individually rather than as a class was invalid because it would prevent the "effective vindication" of federal statutory law is thus flatly at odds with Congress's own judgment in enacting the Sherman Act.

This Court's review is also warranted because the Second Circuit's decision deepens divisions among the courts of appeals on an issue of great importance to American businesses. A majority of the federal

circuits to address the issue have upheld agreements permitting only individual arbitration based on a straightforward and proper application of *Gilmer* and *Mitsubishi*. Additionally, a majority of federal circuits has interpreted *Randolph* to apply only to *arbitration-specific* costs that impede access to the arbitral forum. The Second Circuit's decision here is at odds with those decisions. Given how many American businesses are subject to jurisdiction in the Second Circuit, moreover, that court's improper standard will, absent review, become the *de facto* nationwide rule and effectively eliminate the bargained-for benefits of commercial arbitration agreements nationwide. This Court's review is thus urgently required.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 554 F.3d 300. The memorandum opinion and order of the district court (Pet. App. 44a-68a) is not reported (but is available at 2006 WL 662341).

## JURISDICTION

The judgment of the court of appeals was entered on January 30, 2009. On April 20, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 30, 2009 (because May 30 falls on a Saturday, the petition is due for filing on Monday, June 1). *See* Pet. App. 72a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Arbitration Act and the Sherman Act are reproduced at Pet. App. 69a-71a.

## STATEMENT

1. The named plaintiffs in this case are retail businesses – most with annual revenues between $5 million and $40 million, *see* Pet'rs C.A. Br. 5 n.1 – that chose to accept American Express cards for purchases.[1] Each of the named plaintiffs, as a condition of accepting American Express cards, entered into a written Card Acceptance Agreement (the "Agreement") with American Express.

Since October 1999, that Agreement has specified that all disputes relating to the Agreement or plaintiffs' relationship with American Express be subject to arbitration.[2] In particular, the parties agreed:

> For the purpose of this Agreement, *Claim* means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third party claims and claims based upon contract,

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[1] A significant number of merchants choose not to accept American Express cards. *See United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 388, *modified on other grounds*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003).

[2] Some of the plaintiffs entered into such Agreements before October 1999, but the district court found that the Agreements were amended to include the arbitration provisions and that plaintiffs did not subsequently exercise their right to terminate the Agreement as a result of that amendment. *See* Pet. App. 60a-65a. The Second Circuit did not undermine that factual finding, nor did it otherwise suggest that any plaintiffs had not consented to the arbitration provisions of the Agreement. *See id.* at 42a (finding the issue "moot" in light of the court's other holdings).

> tort, intentional tort, statutes, regulations, common law and equity. . . .
>
> * * *
>
> Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (*NAF*), JAMS/Endispute (*JAMS*), or the American Arbitration Association (*AAA*), as selected by the party electing to use arbitration.

C.A. App. A156; *see* Pet. App. 9a-10a.

The Agreement accepted by the parties is equally clear as to certain agreed procedures for the arbitration, including the fact that the arbitration may not proceed on a class basis:

> IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM, OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PROVIDED FOR IN THE CODE OF PROCEDURES OF THE NAF, JAMS, OR AAA, AS APPLICABLE. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD

HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

C.A. App. A156; *see* Pet. App. 10a-11a.

The Agreement further states that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card . . . , or other persons or entities similarly situated." C.A. App. A156; *see* Pet. App. 11a. The parties also specified that claims of one merchant may not be "joined or consolidated" in arbitration with the claims of other merchants. C.A. App. A156; *see* Pet. App. 11a.

The Agreement establishes that its arbitration provisions are "governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended (*the FAA*)." C.A. App. A156; *see* Pet. App. 11a.

**2.** This petition arises from consolidated cases, certain of which were brought initially in the Northern District of California, but transferred to the Southern District of New York.[3] Plaintiffs' core allegation is that American Express's "Honor All Cards" policy, which requires businesses that wish to accept

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[3] In November 2003, the Northern District of California transferred the *Italian Colors* case to the Southern District of New York because it concluded that the plaintiffs had engaged in improper "forum shopping." Order at 6, *Italian Colors Restaurant v. American Express Co.*, No. C 03-3719 SI (N.D. Cal. Nov. 7, 2003) (C.A. App. A19). The *Cohen Rese* plaintiffs originally filed their suit in California federal court on behalf of a class of California merchants, but ultimately stipulated to transfer to the Southern District of New York. *See* C.A. App. A285. In December 2004, the New York federal court consolidated the transferred cases with other similar cases already pending in that court.

American Express cards to accept American Express charge cards as well as its credit cards, constitutes an unlawful tying arrangement under Section 1 of the Sherman Act. A charge card "requires its holder to pay the full outstanding balance at the end of a standard billing cycle," while a credit card "allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges." Pet. App. 12a. According to plaintiffs, American Express is the dominant provider in the allegedly separate market for charge cards and is using its power in that market to force merchants to accept credit cards with the same allegedly supra-competitive fees applicable to the charge card. *E.g.*, C.A. App. A241-42.[4]

**3.** In March 2006, the district court compelled arbitration of plaintiffs' claims and dismissed their cases. *See* Pet. App. 67a. The court concluded that "Plaintiffs' claims fall within the broad scope of the arbitration provision of the merchant Card Acceptance Agreement." *Id.* at 54a.

The district court specifically rejected plaintiffs' contention that, because pursuing individual antitrust cases was allegedly prohibitively expensive relative to the recovery that each plaintiff could obtain, the parties' agreement to limit arbitration to individual claims would preclude them from "'effectively vindicating . . . federal statutory rights in the arbitral forum'" under *Randolph*. *Id.* at 55a (quoting *Randolph*, 531 U.S. at 90) (ellipsis in original). The

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[4] The Second Circuit has rejected plaintiffs' definition of credit cards and charge cards as separate product markets. *See Visa U.S.A.*, 344 F.3d at 238-39 (finding the "general purpose card market, consisting of the market for charge cards and credit cards," to be a single market).

court concluded that this argument reflected a misreading of *Randolph*.

As the district court explained, the costs *Randolph* suggested might provide a reason not to enforce an arbitration provision were "arbitrators' fees[] *or other costs which would not be incurred in a judicial forum*." *Id.* (internal quotation marks omitted). Because the costs plaintiffs had identified – expert and attorney's fees – would be incurred whether in court or in arbitration, those costs provided no basis for plaintiffs to avoid their agreements. *See id.* at 55a-56a.

The district court further explained that plaintiffs' arguments "ignore[] the statutory protections provided by the Clayton Act" for these Sherman Act claims, including the availability of treble damages and attorney's fees. *Id.* at 56a-57a. The court thus found the arbitration clause enforceable and left to the arbitrator the "enforceability of the collective action waivers." *Id.* at 58a-59a.

**4.** The Second Circuit reversed. Although it did not dispute that the parties' agreement to arbitrate was enforceable, it refused to honor the parties' agreement to limit arbitration to individual claims.[5] It reasoned that the agreement to arbitrate only on an individual basis was unenforceable under the "federal substantive law of arbitrability" because "the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in *either* an individual or collective capacity." Pet. App. 27a-28a, 40a.

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[5] All parties agreed, and the Second Circuit held, that the enforceability of the arbitration agreement, including the provision requiring individual arbitration, raises a question of law for the court, not the arbitrator.

In reaching this conclusion, the Second Circuit acknowledged that, even in federal court, the right to proceed on a class basis is a "procedural right only, ancillary to the litigation of substantive claims." *Id.* at 22a (internal quotation marks omitted). Moreover, the court recognized that this Court has repeatedly concluded that arbitration clauses are enforceable "'"unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."'" *Id.* at 25a (quoting *Gilmer*, 500 U.S. at 26, quoting in turn *Mitsubishi*, 473 U.S. at 628).

The Second Circuit also acknowledged that in *Gilmer* this Court rejected the contention that an arbitration clause was unenforceable on the ground that "'arbitration procedures cannot adequately further the purposes of the [Age Discrimination in Employment Act of 1967 ("ADEA")] because they do not provide for broad equitable relief *and class actions*.'" *Id.* (quoting *Gilmer*, 500 U.S. at 32) (emphasis added). The court recognized that this Court reached that conclusion in *Gilmer* even though the ADEA expressly provides for the bringing of class claims. *See id.* at 26a (citing *Gilmer*, 500 U.S. at 32; 29 U.S.C. § 626(b)).

The Second Circuit nevertheless dismissed *Gilmer* as inapplicable because the plaintiffs here were not arguing for a *per se* ban on agreements limiting arbitration to individual claims but instead were making the more "nuanced" argument that the limitation was not enforceable due to the prohibitive costs of an individual proceeding. *Id.* at 27a-28a.[6] Rather than

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[6] The Second Circuit also dismissed as dicta *Gilmer*'s statement about the enforceability of an arbitration clause requiring individual rather than class arbitration. *See infra* note 7.

adhere to *Gilmer*, the court of appeals concluded that this Court's decision in *Randolph* was "somewhat closer to th[e] issue" presented here. *Id.* at 28a. The Second Circuit ruled that this Court's comment in *Randolph* that "'[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum'" permitted the court to strike down the parties' agreement to forgo class arbitrations upon a showing that plaintiffs with small-value claims "would incur prohibitive costs if compelled to arbitrate under the class action waiver." *Id.* at 28a, 30a (quoting *Randolph*, 531 U.S. at 90).

In applying the standard that it gleaned from *Randolph*, the Second Circuit did not limit its consideration to "*arbitration* costs and fees." *Randolph*, 531 U.S. at 82 (emphasis added); *see id.* at 90-91. Instead, it weighed the value of plaintiffs' individual claims against anticipated *litigation* costs that would exist in either court or arbitration. In particular, the circuit court relied on an affidavit submitted by plaintiffs stating that fees for expert witnesses, which were concededly not recoverable by a prevailing plaintiff, would be "at least several hundred thousand dollars, and might exceed $1 million." Pet. App. 33a. Moreover, the court said that, "[e]ven with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." *Id.* at 35a. The Second Circuit thus held the parties' agreement not to pursue class arbitration unenforceable because these expert and attorney's fees would make an individual proceeding by plaintiffs (whose average claim was for $5,000,

*see id.* at 55a) cost-prohibitive, and thus allegedly confer "de facto immunity from antitrust liability" on American Express. *Id.* at 39a. Notably, the Second Circuit also acknowledged that its reasoning would apply equally to individual litigation in court. *See id.* at 36a n.14 (concluding that "*neither* an individual arbitration, *nor* an individual litigation[,] would make any economic sense in light of the likelihood that expert fees far in excess of any likely individual recovery would need to be expended in either action").

The court of appeals remanded the matter to allow American Express the opportunity to withdraw its motion to compel arbitration in light of the invalidation of the parties' agreement not to pursue class arbitration.

## REASONS FOR GRANTING THE PETITION

### I. THE SECOND CIRCUIT'S DECISION LICENSES SWEEPING AND UNWARRANTED JUDICIAL INTRUSION INTO COMMERCIAL ARBITRATION AGREEMENTS, IN CONFLICT WITH THIS COURT'S FAA PRECEDENTS

This Court's review is warranted because the Second Circuit's decision sanctions a new and wholly unworkable form of judicial interference with commercial arbitration agreements that is fundamentally at odds with this Court's arbitration jurisprudence. Under this Court's cases, arbitration agreements must be enforced as written "unless Congress itself has evinced an intention to preclude" the agreement. *Mitsubishi*, 473 U.S. at 628. In the context of plaintiffs' antitrust claims, courts cannot make an exception to this general rule of enforceability in "the absence of any explicit support for such an exception in either the Sherman Act or the [FAA]."

*Id.* at 628-29. Here, nothing in either statute evinces any intention by Congress to preclude agreements to arbitrate on an individual basis. The Second Circuit's departure from this Court's well-settled case law threatens to undermine a broad array of arbitration agreements, especially in the context of antitrust class actions.

**A.** The FAA makes clear that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Courts confronted with a valid arbitration agreement are to "direct[] the parties to proceed to arbitration *in accordance with the terms of the agreement*." *Id.* § 4 (emphasis added). As this Court has repeatedly held, the FAA establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "[P]assage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

The FAA's pro-arbitration policy applies fully to federal statutory claims. As the Court explained just this Term, it is a "misconception[]" that arbitrators are not "competen[t] . . . to decide federal statutory claims." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009). Thus, "[h]aving made the bargain to arbitrate" a statutory claim, "the party should be held to it, *unless Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628 (emphasis added); *accord Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987)

("[t]he [FAA] . . . mandates enforcement of agreements to arbitrate statutory claims," unless the mandate is "overridden by a contrary congressional command"). Applying that standard, the Court has specifically held that Sherman Act claims are properly arbitrable. *See Mitsubishi*, 473 U.S. at 628.

Moreover, this Court in *Gilmer* specifically concluded that an arbitration clause making no provision for class arbitration was enforceable even though the statute at issue there (the ADEA) specifically contemplated class claims: "'*[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator*, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" 500 U.S. at 32 (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)) (emphasis added; second alteration in original).[7]

*Gilmer*'s holding applies with even greater force to plaintiffs' antitrust claims. The Sherman Act, unlike the ADEA, does not contain any reference to class actions. Indeed, as discussed further below, class actions for damages were not even available in federal court when the Sherman Act was passed, and Congress considered and expressly rejected a proposal to add a class action provision in that law. *See*

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[7] The Second Circuit suggested that *Gilmer*'s conclusion was "dicta" because the Second Circuit believed, based on its own review of the arbitration rules relevant to that case, that class arbitration would have been available. Pet. App. 27a. The Second Circuit's post-hoc research, however, cannot change this Court's explicit statement that the arbitration agreement would be enforceable "even if the arbitration could not go forward as a class action." 500 U.S. at 32 (internal quotation marks omitted).

*infra* pp. 16-17. Thus, if the express recognition of class rights in the ADEA does not demonstrate a congressional intent to bar two parties' agreement to forgo classwide arbitration, it cannot be that the Sherman Act does so. Under this Court's longstanding precedents, the Second Circuit should have concluded – as have other circuit courts in analogous circumstances, *see infra* pp. 22-24 – that there was no statutory bar to enforcing a voluntary agreement to forgo classwide arbitration of Sherman Act claims.

**B.** The Second Circuit's attempt to distinguish *Gilmer* on the ground that it did not involve claims that are "too small to justify bringing an individual action," Pet. App. 23a, is also fundamentally inconsistent with this Court's arbitration jurisprudence. Congress evinced no intent to abrogate agreements to arbitrate only on an individual basis, even in the particular context of supposedly "small-value" claims.

First, when Congress passed the FAA in 1925, it legislated against the backdrop of a pre-Federal Rules procedural regime that distinguished between suits at law and suits in equity. Class actions for damages were not permitted in suits at law. *See* 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1:9, at 32 (4th ed. 2002). Such actions were purely an "invention of equity," *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948), and were permitted only in equity suits until the Federal Rules of Civil Procedure abolished the distinction between law and equity in 1938. *See* Equity Rule 48 (1842); Equity Rule 38 (1912); 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1751, at 13-14 & nn.14, 16 (3d ed. 2005); *id.* at 15-16.

In passing the FAA, Congress did not contemplate aggregation of claims, but rather focused on the

"simplicity, informality, and expedition of arbitration," *Mitsubishi*, 473 U.S. at 628, as the means to facilitate the expeditious and cost-effective resolution of even small claims. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 840 (2008) ("The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims."). Classwide arbitration was simply not contemplated by Congress at the time of the FAA's passage. *See* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 Harv. Negot. L. Rev. 399, 433-434 (2008).[8] Accordingly, nothing in the FAA can be read to preclude parties from agreeing exclusively to individual arbitration.

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[8] The concept of class arbitration did not emerge until the 1980s, when the California state courts began to engraft classwide procedures analogous to the 1966 revisions to Federal Rule of Civil Procedure 23 onto arbitration agreements. *See Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds, Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U. L. Rev. 301, 309 (2004) (stating that *Keating* launched an "experimental state program regarding the combination of class actions and arbitration").

Nor does the Sherman Act reflect any congressional intent to preclude agreements to arbitrate antitrust claims individually, even if they involve small damages. To the contrary, in enacting the Sherman Act, Congress debated extensively about the concern that individual private lawsuits under the Sherman Act[9] would be "ineffectual because individual consumer injuries were too small." Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 23-24 (1989). But Congress ultimately rejected the argument that a class action mechanism was necessary to vindicate federal antitrust policies given that concern.

Specifically, Senator James Z. George of Mississippi proposed "an amendment that would have permitted a type of plaintiff class action in which liability would be determined as to a large group of plaintiffs but damages would be assessed to each individually." *Id.* at 25. In advocating for that amendment, Senator George, like the plaintiffs below, argued that individual lawsuits would be ineffectual in vindicating small claims:

> It is manifest that in nearly every instance the damage by the advanced price of each article affected by these combinations would be – though in the aggregate large, indeed – so small as not to justify the expense and trouble of a suit in a distant court.

*Id.* at 24-25. Other such comments abounded. *See id.* at 25-26 & n.78, 47-48 & nn.185-86.

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[9] *See* Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (providing for a private right of action, including "three fold . . . damages" and "the costs of suit, including a reasonable attorney's fee").

Ultimately, however, Congress rejected the proposed amendment and declined to adopt a class action mechanism to address the problem of small claims. *See id.* at 25; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (noting that the Congress "rejected a proposal to allow a group of consumers to bring a collective action as a class"). Instead of promoting consumer class actions, the framers of the Sherman Act preferred to emphasize the ability of competitors and the federal government to enforce federal law. "[N]o one doubted that competitor lawsuits would work." Hovenkamp, 88 Mich. L. Rev. at 26. Moreover, legislators emphasized "the power of the United States government to bring suit" under Section 4 of the Sherman Act. *See id.* at 26 & n.81; *Gilmer*, 500 U.S. at 32 (likewise noting importance of government actions under the ADEA). The Second Circuit's holding that aggregation of small claims is necessary to vindicate the Sherman Act is thus squarely at odds with Congress's own considered policy judgment.[10]

In sum, Congress has never expressed any intent to preclude parties from agreeing to individual rather than class arbitration as to antitrust claims. Under *Mitsubishi* and *Gilmer*, there was thus no justification for invalidating that provision of the parties' arbitration agreement, notwithstanding the possibility that some plaintiffs with small damages would not have a sufficient incentive to bring a civil suit.[11]

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[10] The Clayton Act applied the Sherman Act's private right of action to all of the antitrust laws, but it likewise did not adopt any private class enforcement mechanism. *See* Hovenkamp, 88 Mich. L. Rev. at 27.

[11] Given that Congress rejected including a class action device in the Sherman Act, it cannot have viewed an agreement

Other circuit courts have applied the same reasoning in upholding such provisions in similar situations. *See infra* pp. 22-24.

**C.** The Second Circuit rested its analysis on a misapprehension of this Court's decision in *Randolph*. The Second Circuit read *Randolph* as permitting federal courts to make *ad hoc* determinations in each individual case whether the costs of litigating will make the claim uneconomical for the claimant to bring in the manner provided for in the parties' arbitration agreement. *Randolph*, however, offers the lower courts no license to overturn otherwise valid arbitration agreements based on such an open-ended and unworkable inquiry, untethered to any federal statute.

This Court in *Randolph* did nothing more than recognize that costs *unique* to arbitration – such as the need to pay an arbitrator's potentially significant fees – might be so high as to effectively preclude access to the arbitral forum. In other words, *Randolph* relates to the extra "price of admission" to the arbitral forum that a litigant would not incur if he filed in court. *See* 531 U.S. at 90 ("It may well be that the existence of *large arbitration costs* could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.") (emphasis added); *see also* Drahozal, 41 U. Mich. J.L. Reform at 840 (noting that, in "some categories of disputes, administrative fees and arbitrators' fees exceed the filing fees in court," though, "for small consumer claims and many employee claims," such fees are

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to arbitrate on an individual basis as the equivalent of a "prospective waiver" of the right to bring a Sherman Act claim, which the Court declared problematic in *Mitsubishi*, 473 U.S. at 637 n.19.

"very similar to upfront costs in court"). Indeed, the costs discussed in the relevant portion of *Randolph* are all costs unique to arbitration. *See* 531 U.S. at 90 n.6 (discussing the potential costs of "filing fees" and potential "per day . . . arbitrator's fee").

In the courts below, plaintiffs did not contend – much less introduce any evidence – that *arbitration-specific* costs made individual arbitration prohibitively expensive. That should have been the end of the analysis under *Randolph*. *See id.* at 90 & n.6 (dismissing challenge because the "record d[id] not show" that plaintiff would bear excessive arbitration costs). The Second Circuit, however, without any effort at justification, dramatically expanded the inquiry to include *all* costs, including costs (such as expert fees and attorney's fees) that a litigant would incur even in court. That ruling finds no justification in *Randolph*, which dealt only with arbitration-specific costs, and is also directly contrary to *Mitsubishi* and *Gilmer*, which forbid judge-made exceptions to arbitration agreements in the absence of some congressional expression of intent to preclude such agreements. *See Mitsubishi*, 473 U.S. at 627 (Congress is fully equipped "to identify any category of claims as to which agreements to arbitrate will be held unenforceable"); *Gilmer*, 500 U.S. at 26; *see also Pyett*, 129 S. Ct. at 1472 (rejecting "judicial policy concern as a source of authority" for invalidating arbitration agreements).

Any such expansion of *Randolph* is also unworkable because these other costs – beyond the threshold "price of admission" to the arbitral forum – cannot properly be determined *in advance of the arbitration proceeding itself.* Here, for example, the Second Circuit prejudged a number of procedural matters that

this Court has said are normally within the province of the arbitrator. *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003) (plurality op.) (arbitral procedures are a matter for the arbitrator). For example, it presupposed the need for formal, lengthy, and expensive expert reports, *see* Pet. App. 30a-32a, before there was any arbitration record, and thus before the court could know whether the arbitrator would fashion flexible and less costly procedures for that testimony. *See, e.g., Byrd*, 470 U.S. at 220 (noting Congress's view in passing the FAA that "the costliness and delays of litigation" "can be largely eliminated by agreements for arbitration") (internal quotation marks omitted).

Moreover, the Second Circuit concluded, without any apparent basis, *see* Pet. App. 36a, that a contractual bar on plaintiffs' sharing of information would be construed by the arbitrator to prevent them from sharing expenses as to the generally common issues that would be covered by the report of an antitrust economist. If plaintiffs are right that there is sufficient commonality that this case could proceed as a class under Federal Rule 23(a)-type standards – an assumption that the Second Circuit made without any apparent basis – surely issues regarding American Express's market power and the allegedly anticompetitive nature of its Honor All Cards policy should be the same as to the various plaintiffs. The arbitrator could allow plaintiffs to propound the same (or even common) discovery requests as to such issues and to provide a common report as to those issues. In invalidating the parties' agreement, the Second Circuit improperly assumed that the arbitrator was powerless to craft flexible and efficient

procedures while remaining faithful to the parties' agreement.

In short, the Second Circuit's decision warrants this Court's review because it creates a broad and unworkable new exception to the enforceability of arbitration agreements that is fundamentally at odds with this Court's precedents.

## II. THE SECOND CIRCUIT'S DECISION WARRANTS THIS COURT'S PROMPT REVIEW

The decision below warrants this Court's immediate review because it deepens divisions among the courts of appeals as to the enforceability of agreements permitting only individual and not class arbitration. Further percolation is not justified because the Second Circuit's decision will have an immediate and broad impact – and threatens to become the *de facto* rule for all nationwide class actions – given the ease with which such actions can be brought in the Second Circuit.

### A. The Decision Below Deepens Divisions Among the Courts of Appeals Regarding the Enforceability of Agreements Calling for Individualized Arbitration

This Court's intervention is warranted because of the disarray among the courts of appeals as to the proper standard under federal law for the enforceability of agreements providing for individual but not class arbitration. Although the issue has been percolating for nearly a decade, since this Court's decision in *Randolph* declined to address the issue, *see* 531 U.S. at 92 n.7, the federal circuits have adopted disparate approaches to both of the questions presented by the petition. The differences among the circuits should now be resolved because they create incentives for forum shopping and other forms of games-

manship. *See, e.g., supra* note 3 (noting certain of plaintiffs' "forum shopping").

1. First, the courts of appeals have disagreed on whether the enforceability of agreements calling for individualized arbitrations should be addressed on a statute-by-statute or a case-by-case basis. Four federal circuits – the Third, Fifth, Seventh, and Eleventh Circuits – have analyzed such agreements on a statute-specific basis, pursuant to *Mitsubishi* and *Gilmer*.[12] Each of those courts adopted the analysis of then-Chief Judge Becker in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), which held, pursuant to a straightforward reading of *Mitsubishi* and *Gilmer*, that an agreement providing for individualized arbitration is enforceable under the FAA unless there is evidence of legislative intent to preclude such a provision in the text, legislative history, or underlying purposes of the substantive federal statute in question. *See id.* at 370-71 (citing *Mitsubishi*, 473 U.S. at 628; *Gilmer*, 530 U.S. at 26).

In *Johnson*, Judge Becker recognized that the statutes at issue – the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.* – were passed by Congress with the recognition that class actions would serve as "an important encouragement to . . . voluntary compliance" with federal law. 225

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[12] *See Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007); *Johnson v. West Suburban Bank*, 225 F.3d 366, 370-71 (3d Cir. 2000); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003); *Randolph v. Green Tree Fin. Corp. – Alabama*, 244 F.3d 814, 818 (11th Cir. 2001) ("*Randolph II*"), *on remand from Green Tree Fin. Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000).

F.3d at 372 (internal quotation marks omitted). Nonetheless, he concluded that nothing in the TILA or EFTA conferred an *unwaivable* right to a class action.[13] As discussed above, that reasoning would require reversal here, given that nothing in the FAA or the Sherman Act contemplated class proceedings for damages, and Congress expressly refused to incorporate any class action provision in the Sherman Act. *See supra* pp. 16-17.

In *Johnson*, the fact that the value of the plaintiff's claim was at most $250.00 – the amount of the plaintiff's loan – was of no relevance to the court's statute-specific analysis. Although the court in *Johnson* did not explicitly reject the small value of the claim as a basis for invalidating the parties' agreement, a later Third Circuit case, *Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007), relying on *Johnson*, did reject the supposedly "prohibitive costs" of individual arbitration as a federal law ground for invalidating a class arbitration prohibition.[14]

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[13] Judge Becker emphasized three factors supporting the enforceability of the class arbitration prohibition under the TILA. First, plaintiffs in arbitration "retain the full range of rights created by the TILA." *Johnson*, 225 F.3d at 373. Second, nothing in the arbitration agreement limited the arbitrator's right to "afford [the plaintiff] any relief that he could individually obtain in a court proceeding, including injunctive relief or attorney's fees." *Id.* at 373-74. Finally, the statute's administrative enforcement mechanisms "offer meaningful deterrents to violators of the TILA if private enforcement actions should fail to fulfill that role." *Id.* at 375.

[14] The Third Circuit's recent decision in *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009), referred to this aspect of *Gay* as "appear[ing] to be dicta," but it did not back away from *Gay*'s reasoning, instead merely clarifying that *Gay* did not entail "a blanket prohibition on unconscionability challenges to class-arbitration provisions." *Id.* at 229-30. Notably,

The Fifth, Seventh, and Eleventh Circuits have all adopted Judge Becker's analysis in *Johnson* to uphold agreements to avoid class arbitration. In each case, the court of appeals, following *Johnson*, *Gilmer*, and *Mitsubishi*, analyzed the enforceability of such agreements based on whether Congress had expressed its intent in the underlying federal statute to preclude parties from entering into them. *See Randolph II*, 244 F.3d at 817-18; *Livingston*, 339 F.3d at 558-59; *Carter*, 362 F.3d at 298. The other circuits adopting *Johnson* also did not consider the value of the plaintiff's claim relative to anticipated arbitration costs relevant to their analysis. *See Carter*, 362 F.3d at 298; *Randolph II*, 244 F.3d at 815; *Livingston*, 339 F.3d at 558-59.

The Second Circuit in the decision below and the First Circuit in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), departed from their sister circuits, in holding that federal law precludes enforcement of an agreement limiting arbitration to individual claims where, "on a case-by-case basis, considering the totality of the facts and circumstances," the cost of individual arbitration would be prohibitive in light of the low face-value of the claim. Pet. App. 41a (internal quotation marks omitted).[15] Unlike *Johnson* and its

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*Homa* involved state, not federal, claims, so it does not affect the Third Circuit's analysis of arbitrability under federal law, and it does not suggest that the Third Circuit would no longer apply the *Johnson* analysis to such claims.

[15] The Fourth Circuit has embraced a similar rule, albeit in dicta. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) ("[W]e have held that the inability to bring a class action does not in and of itself render an arbitration agreement unenforceable, but we have acknowledged that if a party could demonstrate that the prohibition on class actions

progeny, neither of these decisions purported to root its analysis in congressional intent under the Sherman Act or the FAA. *See id.* at 54a; *Kristian*, 446 F.3d at 54 (invalidating class arbitration waiver despite acknowledging that the "arbitration agreements' class mechanism prohibition is *not* in direct conflict with the relevant antitrust statutes, state and federal, which do not mention class actions"). Instead, both purported to read into the federal law of arbitrability an *ad hoc* judicial inquiry into whether a class arbitration waiver would make individual arbitration prohibitively costly.

The Second Circuit's free-floating analysis, unmoored from any underlying federal statute, creates a division among the circuits that warrants this Court's review. Under the decisions of the majority of circuits, the relevant statute-specific inquiry is whether Congress evinced intent to preclude class waivers under the Sherman Act. Had that standard been applied here, the parties' arbitration agreement would have been upheld in full.

**2.** The courts of appeals have also differed on the proper scope of *Randolph*'s "prohibitive costs" analysis. The majority of courts of appeals to analyze the issue, like the district court below, have looked only at those costs – such as filing fees, arbitrator fees, and hearing costs – that are unique to arbitration and restrict *access* to the arbitral forum. These courts have held that "[t]he court[s] must evaluate the likely cost of arbitration not in absolute terms, but *relative to the likely costs of litigation*." *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 511 (6th Cir. 2004); *accord Bradford v. Rockwell Semiconductor Sys., Inc.*,

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likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.") (citations omitted).

238 F.3d 549, 556 (4th Cir. 2001) (courts should assess "the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims").[16]

Such a limitation is dictated by *Randolph* itself, which dealt only with "*arbitration* costs." *Randolph*, 531 U.S. at 90 (emphasis added). Moreover, these circuit decisions are consistent with this Court's broader arbitration jurisprudence, which has consistently recognized that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232. Accordingly, arbitral procedures are no grounds for invalidating the parties' agreement unless they impose barriers to access that would not be present in a judicial forum. *Compare Gilmer*, 500 U.S. at 30-31 (upholding limits on discovery, waiver of the federal rules of evidence), *with Randolph*, 531 U.S. at 90 n.6 (focusing on "filing fees" and "arbitrator's fee").

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[16] *See also, e.g.*, Pet. App. 54a-58a; *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 12-13 (1st Cir. 2009) (Boudin, J.) (stating that proper inquiry is "whether the arbitration regime . . . is structured so as to *prevent* a litigant from having *access to the arbitrator* to resolve claims," and noting that "court litigation can also be expensive, but at least one does not need to pay the judge") (second emphasis added); *James v. McDonald's Corp.*, 417 F.3d 672, 679-80 (7th Cir. 2005) (American Arbitration Association ("AAA") fees and service costs); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 284 (3d Cir. 2004) ("reasonably anticipatable fees and expenses of the arbitrator"); *Bess v. Check Express*, 294 F.3d 1298, 1303-04 (11th Cir. 2002) (AAA fees and costs); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483-85 (D.C. Cir. 1997) (arbitration costs are of concern because "[litigants] would never be required to pay for a judge in court").

The decision below departed from its sister circuits by expanding the relevant "costs" to include not only arbitration costs, but also other costs that would be equally applicable to a lawsuit in court. The court credited the conclusion of plaintiffs' economic expert that "'it would not be worthwhile for an individual plaintiff . . . to pursue *arbitration or litigation* where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.'" Pet. App. 33a (quoting Decl. of Gary L. French, Ph.D. (C.A. App. A365)) (emphasis added; ellipsis in original); *id.* at 31a (calculating the "likely out-of-pocket costs of the *arbitration or litigation proceeding*") (emphasis added). The Second Circuit's decision to invalidate a class *arbitration* prohibition, on the basis of costs that would be required whether in an "arbitration *or litigation* proceeding," *id.* (emphasis added), is unwarranted and clearly at odds with the other circuits to have addressed the issue. *See supra* pp. 25-26 & note 16; *but see Kristian*, 446 F.3d at 54 (relying on fact that "expert fees alone are estimated to be in the hundreds of thousands of dollars; and attorney's fees could reach into the millions of dollars").

The enforceability of agreements providing for individual but not class arbitration is an issue that has deeply divided the courts of appeals. Moreover, given the frequency with which these agreements appear in commercial arbitration agreements, *see* Thomas A. Dickerson, *New York State Consumer Protection Law and Class Actions in 2007 – Part I*, 80 N.Y. State Bar J. 42, 42 (Feb. 2008) (noting the "dramatic increase" in "class action waivers"), the issue will continue to

be frequently litigated.[17] This Court's review is warranted to provide guidance to the lower courts on an issue of national commercial importance.

### B. Review Is Warranted Now Because the Second Circuit's Improper New Form of Judicial Intrusion Will Undermine a Broad Swath of Commercial Arbitration Agreements

The Second Circuit's holding has far-reaching implications that threaten parties' settled expectations under countless arbitration agreements nationwide. The importance of this Court's review is bolstered by three additional factors: (1) judicial invalidation of provisions that require individual rather than class-wide arbitration will effectively deprive the parties of the benefit of their arbitration agreement as a whole; (2) the Second Circuit's sweeping rule will cover a broad range of disputes, including all but the largest competitor lawsuits under the antitrust laws; and (3) the Second Circuit's holding will effectively create a nationwide rule, given the number of corporations that plaintiffs' lawyers can sue in the courts of that circuit.

**1.** The practical effect of the Second Circuit's rule will be to abrogate parties' arbitration agreements as

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[17] *See, e.g., Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 897-99 & n.4 (S.D. W. Va. 2009) (upholding class action waiver under FAA); *Shubert v. Wells Fargo Auto Fin., Inc.*, Civil No. 08-3754 (NLH), 2008 WL 5451021, at *6 (D.N.J. Dec. 31, 2008) ("class action waiver is valid and enforceable under the FAA"); *Weinstein v. AT&T Mobility Corp.*, Civil Action No. 07-2880, 2008 WL 1914754, at *5 (E.D. Pa. Apr. 30, 2008) (upholding class waiver); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 259 (S.D.N.Y. 2005) ("Agreements to waive class remedies are enforceable."), *amended on other grounds*, No. M 21-95, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005).

a whole. The reason for this is simple: the specter of class arbitration fundamentally vitiates the bargain struck by parties who chose individual arbitration.

As this Court has recognized, parties that elect arbitration "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628; *see Pyett*, 129 S. Ct. at 1471. Parties mutually interested in adopting more cost-effective and expeditious (as opposed to more formal) dispute resolution will often rationally agree to individual arbitration as part of that trade-off. As described above, one of the core benefits of individual arbitration, as opposed to litigation, is its facilitation of flexible and efficient procedures for the expeditious resolution of claims. *See supra* p. 15. *Class* arbitration, however, fundamentally alters the equation by skewing the risks of litigation heavily against the defendant. While each individual claimant's stake remains modest, aggregation of claims in class arbitration creates enormous litigation risk for the defendant. As a result, a prospective defendant's willingness, in an individualized context, to trade formal judicial procedures for the "simplicity, informality, and expedition of arbitration" does not necessarily indicate equal willingness to do so in high-stakes "bet the company" litigation. Judicial invalidation of an agreement to limit arbitration to individual claims thus fundamentally rewrites the parties' bargain, in contravention of the FAA.

Class arbitration also changes the parties' bargain because it subjects them to a new and untested form of procedure that remains highly uncertain. For instance, as this Court has recognized, because a judgment in a properly certified class action extin-

guishes the claims of absent class members, class actions require careful oversight in order to protect the due process rights of those absent class members. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (class actions implicate the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process") (internal quotation marks omitted). What procedures will be required to protect absent class members' rights in class *arbitrations* remains unclear. *See, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1721 (2006) (noting "the lack of uniformity, the ill-defined roles for the court and the arbitrator, and the unclear due process rights of absent members in a class arbitration"); Buckner, 82 Denv. U. L. Rev. at 302 (noting that some courts permitting class arbitration have "required ongoing judicial supervision") (internal quotation marks omitted).

Given the ways in which class arbitration rewrites the parties' bargain, it is entirely predictable that many parties faced with an unbargained-for choice between class arbitration and class litigation will forgo arbitration altogether. Invalidating parties' agreements to avoid class arbitration thus cuts at the core of the FAA's "liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24.

**2.** The Second Circuit's decision, if left unreviewed, threatens to undermine commercial arbitration agreements in virtually every putative antitrust class action. The Second Circuit's adoption of a rule requiring case-by-case speculation as to future litiga-

tion costs inappropriately turns the threshold arbitrability question into a highly fact-dependent battle of litigation-cost experts that will inject enormous uncertainty into parties' expectations regarding the process for dispute resolution.

Moreover, the Second Circuit's test will upset those legitimate expectations by undermining parties' arbitration agreements in a broad range of cases. The Second Circuit effectively held that any individual claimant whose damages are less than several hundred thousand or a million dollars – the cost of a formal expert report, according to the court – is entitled to insist that arbitration proceed on a classwide basis. For all practical purposes, that rule will encompass virtually all claims that could realistically be brought on a classwide basis under the antitrust laws. Antitrust claims brought by consumers will usually involve modest damages, presumably far less than $1 million *per plaintiff*. *See supra* pp. 16-17 (noting Congress's recognition that consumer plaintiffs would not likely bring private antitrust claims). Moreover, as illustrated by the decision below, even non-consumers, such as the retail merchants at issue here, are unlikely to have suffered per-plaintiff damages of as high as $1 million per plaintiff. *See* Pet. App. 33a (finding that the largest merchant suffered an estimated $12,850 in damages).

It is difficult to think of a case in which an individual consumer or a business that purchases goods will have suffered damages high enough to be able to bring an individual suit under the Second Circuit's sweeping test. The only class of claims that the ruling may leave unaffected is competitor suits under the antitrust laws, which involve potentially larger damages, but are usually not amenable to class treat-

ment in any event.[18] Thus, the practical effect of the Second Circuit's rule will be to invalidate individual arbitration agreements as to virtually any antitrust claim that could plausibly be brought as part of a class. *See also* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1008, table 5 (1986) (finding that only about one in three antitrust lawsuits is brought by a competitor).

3. The Second Circuit's decision, although at odds with that of other circuits, will likely have nationwide effect because of the large number of companies that have a significant business presence in New York and are therefore amenable to jurisdiction and venue in the Second Circuit. New York is the hub of numerous major U.S. and global industries, including the banking and financial services, insurance, real estate, and media and advertising industries. Nearly one in ten Fortune 500 companies is headquartered there. *See* http://money.cnn.com/magazines/fortune/fortune500/2008/states/NY.html.

The decision below will make the Second Circuit a new magnet for the class action bar and plaintiffs seeking to avoid the terms of valid, binding agreements to arbitrate in the context of antitrust claims.[19]

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[18] Competitor claims are not ordinarily susceptible to class treatment, because competitors are unlikely to be so numerous as to require class treatment, *see* Fed. R. Civ. P. 23(a), and the question of each competitor's "antitrust injury" will usually be too fact-specific to satisfy Rule 23(b)(3)-type standards. *See* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 567-75 (1991).

[19] A similar phenomenon has already occurred in California, where courts have routinely invalidated class action waivers under state law. *See, e.g., Discover Bank v. Superior Court*, 113

Given the ease with which corporations can be haled into court in the Second Circuit, and the new incentive of plaintiffs to bring suit there, the Second Circuit's rule threatens to become the *de facto* nationwide rule. Further percolation of this issue is not warranted given the broad impact that the Second Circuit's decision will have on American businesses.

* * * * *

The Second Circuit invalidated the parties' agreement to arbitrate individually, rather than as a class, in a purported effort to vindicate the policies of the Sherman Act. It did so even though the FAA did not contemplate class arbitrations, and even though Congress, addressing that same policy issue, declined to include a class action provision in the Sherman Act. This Court's review is urgently required because the Second Circuit's erroneous decision threatens to become the *de facto* nationwide standard and undermine the FAA's pro-arbitration policy in a wide range of antitrust claims.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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P.3d 1100 (Cal. 2005). In order to take advantage of these favorable decisions, plaintiffs, including the *Italian Colors* plaintiffs here, have sought to bring their claims in federal courts in the Ninth Circuit. *See supra* note 3.

Respectfully submitted,

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May 29, 2009

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 06-1871-cv

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION,

ITALIAN COLORS RESTAURANT, ON OR BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, NATIONAL SUPERMARKETS ASSOCIATION, 492 SUPERMARKET CORP., BUNDA STARR CORP., PHOUNG CORP.,
*Plaintiffs-Appellants*,

v.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, AMERICAN EXPRESS COMPANY,
*Defendants-Appellees*.

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Argued: Dec. 10, 2007

Decided: Jan. 30, 2009

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POOLER, SACK, and SOTOMAYOR, Circuit Judges.

POOLER, Circuit Judge:

This Court frequently enforces mandatory arbitration clauses contained in commercial contracts. We do so on the principle that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we have often and emphatically applied."

*Arciniaga v. General Motors Corp.*, 460 F.3d 231, 234 (2d Cir.2006) (quotation marks omitted). On this appeal, however, we are asked to consider the enforcement of a mandatory arbitration clause in a commercial contract that also contains a "class action waiver," also referred to as a "collective action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. This is a matter of first impression in our Court.[1]

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[1] We note that two district courts in our Circuit have found class action waivers in mandatory arbitration clauses to be enforceable. In *Sherr v. Dell, Inc.*, No. 05cv10097, 2006 WL 2109436 (S.D.N.Y. July 27, 2006), a consumer brought a putative class action suit against Dell alleging that certain of the latter's products had a dangerous tendency to overheat. The plaintiff asserted claims under the statutory and common law of New York. *Id.* at *1. Dell moved to compel arbitration and for the enforcement of a class action waiver contained in its sales contract, the terms of which were not even available to the consumer before purchase short of his calling a special telephone number or visiting a Dell internet site. *Id.* The district court granted the motion to compel, holding that the "plaintiff is not entitled to a class action suit or class-wide arbitration to vindicate the rights of everyone else with a similar problem. The [Federal Arbitration Act's] primary purpose is not to create a right to sue as a class. Its main purpose is to ensure that private agreements to arbitrate are enforced according to their terms." *Id.* at *7 (quotation marks omitted). The case was decided according to the law of Texas, which, the district court found, had incorporated the Federal Arbitration Act as part of its substantive law. *Id.*

*Dumanis v. Citibank (South Dakota), N.A.*, No. 07cv6070, 2007 WL 3253975 (W.D.N.Y. Nov.2, 2007), was an action involving credit card interest rates brought under the federal Truth in Lending Act, 15 U.S.C § 1601 *et seq.*, and the New York General Business Law. The contract at issue had a South Dakota choice of law clause, and the decision was based upon the law of that state, not the federal law of arbitration. *Id.* at *2-*3. The

One commentator has recently contended that "[t]he outright banning of class action in mandatory arbitration clauses has become a standard policy for many corporations that transact with consumers." Bryan Allen Rice, "Comment: Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard," 45 *Hous. L.Rev.* 215, 224 (2008).[2] We acknowledge at the outset, as have other courts that have considered questions arising from the enforcement of class action waivers, in both consumer and commercial contracts, that the wisdom and utility of these provisions have become the subject of intense debate. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 63 (1st Cir.2007) ("We recognize that there is a policy debate about whether class action waivers essen-

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district court enforced the class action waiver contained in the contract's mandatory arbitration clause, both because the plaintiff could have "opt[ed] out" of the arbitration clause by not renewing his credit card and because the plaintiff had not been stripped of any substantive remedies; he merely could not pursue them "in the arguably more-favorable context of a class action." *Id.*

We note that in neither *Sherr* nor *Dumanis* does it appear that the plaintiff made a substantial demonstration – which we hold that the plaintiffs have made here – to the effect that an inability to pursue arbitration on a class basis would be tantamount to an inability to assert their claims at all.

[2] Two commentators have suggested that this is particularly so in the credit card industry: "Credit card companies have shown themselves to be even less enthusiastic about classwide arbitration than about class action litigation. The 'devil you know' phenomenon is compounded by the uncertainty of judicial review of class certification in arbitration and the concomitant fear of a 'renegade arbitrator' certifying a class and exposing a company to massive liability." Samuel Issacharoff & Erin F. Delaney, "Credit Card Accountability," 73 *U. Chi. L.Rev.* 157, 179 (2006).

tially act as exculpatory clauses, allowing for violations of laws where individual cases involve low dollar amounts and so will not adequately address or prevent illegality."). The opposing positions in this frequently impassioned debate have been dispassionately described as follows:

> Companies' use of class action waivers is motivated by the view that plaintiffs exploit the class action procedure in order to wrest large and unfair settlements from defendants .... Class action waivers are viewed by these companies as a way to defend themselves from consumers who are ganging up on companies through the leverage inherent in the aggregation of large numbers of claims. In further support of these waivers, corporations argue that the many (perceived) advantages of arbitration to a plaintiff make up for any disadvantages or inconveniences that the plaintiff may incur by sacrificing the ability to be part of a class action.
>
> ... Opponents of class action waivers contend that the ability to aggregate claims is crucial to protect the rights of those individuals ... who do not have the resources to litigate individual claims. Further, many individual claims are only viable if brought on a class-wide basis. Indeed, by prohibiting class actions in ... lawsuits[] where the expected recovery is dwarfed by the cost of litigating or arbitrating the claim, individuals are effectively prevented from pursuing their claims. As a result, businesses are able to engage in unchecked market misbehavior ....

J. Maria Glover, "Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agree-

ments," 59 *Vand. L.Rev.* 1735, 1746-47 (2006) (footnotes and internal quotation marks omitted).

Both of these positions have been proffered to the Court by amici. *Compare* Brief of Atlantic Legal Foundation at 4 ("For several decades, providers of products and services in the United States have been beset with a litigious environment that has evoked criticism of many observers and applauded only by those professionals who have harvested the substantial financial rewards the civil justice system has produced by way of attorneys' fees . . . . Recognizing the risks of defending against class action litigation, many businesses have elected to have disputes resolved by individual arbitrations and to adopt collective action waivers as part of their arbitration clauses with their business customers to insure that result.") *with* Brief of Trial Lawyers for Public Justice at 27 ("It is . . . crucial to understand that any ban on class arbitration is essentially a ban on class treatment altogether, as arbitration clauses in standardized corporate contracts are made broader and broader, to encompass all conceivable types of disputes . . . . Under a regime where such prohibitions are enforced, such clauses are tantamount to a clause banning all claims against a corporation, unless they are so large that they justify the outlay of the extraordinary expense involved.").[3]

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[3] Interestingly, when it enacted the Class Action Fairness Act of 2005, Congress itself found both utility and danger in the use of the class action device. *Compare* Pub.L. No. 109-2, § 2(a)(1), 119 Stat. 4 (2005) ("Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated . . . .") *with id.* at § 2(a)(2) ("Over the past decade, there have been abuses of the class

We note that two standard treatises on the conduct of class action litigation appear to take opposing positions as well. *Compare* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice*, § 2:14 (3d ed. 2006) ("As the potential availability of class-wide arbitration threatens to multiply exponentially the exposure on what is facially a single-consumer issue, companies should strongly consider including in their standard arbitration agreements an express provision barring class action litigation or arbitration.") *with* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 9:67 n. 2 (4th ed. 2008) ("The bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights.").

While we are conscious of this debate, we are thankful that we need not resolve it on this appeal. That is, we do not decide whether class action waiver provisions are either void or enforceable *per se*. Rather, we are concerned solely with the class action waiver contained in the contract between the parties before us on this appeal. We conclude that, on the record before us, the plaintiffs have adequately demonstrated that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs.

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action device that have – (A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system.").

## FACTS

**A. Procedural Posture.** The plaintiffs appeal from the judgment, dated March 20, 2006, memorializing the memorandum opinion and order, dated March 15, 2006, of the United States District Court of the Southern District of New York, which granted defendants American Express Company and American Express Travel Related Services Company, Inc.'s (collectively "Amex") motion to compel arbitration. *See In re American Express Merchants Litig.*, No. 03cv9592, 2006 WL 662341 (S.D.N.Y. March 16, 2006) (Daniels, J.). The earliest iteration of the plaintiffs' claims was made in August 2003, with the filing of a class action complaint in the United States District Court for the Northern District of California ("the *Italian Colors* action"). This action, and another subsequently filed class action, were transferred, on Amex's motion, brought pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Southern District of New York. (JA 14, 85) By an order, dated December 10, 2004, that court consolidated these two actions, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, with several class actions that had been filed in the Southern District of New York. Any subsequently filed related actions were also made subject to this consolidation order.

Because we consider here only the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, a prolix description of the plaintiffs' claims is unnecessary. (And, needless to say, we take no position on the merits of these claims.) In their briefs on this appeal, the parties describe the plaintiffs' claims largely by reference to the amended complaint,

filed December 24, 2003, in the *Italian Colors* action. We will do so as well.

**B. The Parties.** The plaintiffs allege that Amex "is the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants." The named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets." The named plaintiffs seek to represent the following class, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> The class is comprised of all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States . . . .

**C. The Card Acceptance Agreement.** The basic contractual relationship between Amex and the plaintiffs is set forth in an affidavit of an Amex executive:

> American Express issues card products to its cardmembers, which cardmembers then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $10 million agree that, by submitting charges for payment by American Express, their relationship will be gov-

erned by the "Terms and Conditions for American Express© Card Acceptance" ("the Card Acceptance Agreement").[4]

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right

> to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause. That clause is nothing if not capaciously worded:

> For the purpose of this Agreement, *Claim* means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited

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[4] Amex confirmed at oral argument that this $10 million figure relates to purchases made with Amex products, not to purchases made by credit cards generally.

to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.

* * *

Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (*NAF*), JAMS/Endispute (JAMS), or the American Arbitration Association (*AAA*), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the fact that the Agreement also contains the following provision:

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF

CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (*Service Establishments*), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

Thus, the Card Acceptance Agreement not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis. The Card Acceptance Agreement further provides as follows:

This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended (*the FAA*). The arbitrator shall apply applicable substantive law consistent with the FAA . . . . In conducting the arbitration proceeding, the arbitrator shall not apply the Federal or any state rules of civil procedure or rules of evidence. The

> arbitrator shall apply the applicable provisions of the Code of Procedure of the NAF, JAMS or AAA, as applicable to matters relating to evidence and discovery.[5]

**D. The Plaintiffs' Substantive Claims.** The plaintiffs' dispute with Amex rests upon the distinction between "charge cards" and "credit cards." The district court explained the distinction as follows:

> A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

*In re American Express Merchants Litig.*, 2006 WL 662341, at *1 n. 6.

According to the plaintiffs, Amex had until recent years centered its business on the issuance of corporate and personal charge cards to corporate clients and affluent consumers. Amex is alleged to be the undisputed leader in this market, to the extent that it "issues Corporate Cards to at least 70% of the

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[5] The plaintiffs make no challenge to this preemption of the Federal Rules of Civil Procedure by the rules of the various arbitration firms listed in the Card Acceptance Agreement. We note, however, that some commentators have argued that plaintiffs are placed at a distinct disadvantage by class arbitration rules of these firms. *See* Daniel R. Higginbotham, "Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers," 58 *Duke L.J.* 103, 123 (2008) ("Regarding many important issues . . . the rules [of arbitration firms] are either silent or diverge significantly from the Federal Rules of Civil Procedure, raising serious questions as to the ability of class arbitration to adequately resolve disputes.").

companies included in the Fortune 500, and is likewise the leading issuer of Corporate Cards to middle-market companies . . . and small businesses." The plaintiffs further assert that "[h]olders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes." In fact, the plaintiffs allege that Amex itself contends that "the average purchase on an American Express card is 17% higher than the average purchase made on a credit card."

Thus, the holder of a charge card is likely to be "a higher class of customer" and, as such, is particularly attractive to merchants such as the plaintiffs. Amex is certainly not unaware of this attraction, and as a result of it, Amex has traditionally been able to charge high "merchant discount fees," which are the fees a card issuer withholds as a percentage of each purchase made with its card at the merchant's establishment. These fees, the plaintiffs aver, "are at least 35% higher than competitive rates" applicable to mass-market credit cards such as Visa, MasterCard, and Discover.

Over the last decade, however, the plaintiffs contend that Amex's "business in the markets for credit card issuance and credit card services has grown dramatically." Specifically, Amex has in recent years created new credit card products "marketed to college students, young adults and others who would certainly not produce the high per-transaction spending that Amex uses to justify [the] high [merchant] discount fees. By leveraging its market power in corporate and personal charge cards, however, American Express was able to compel merchants to accept its

new revolving credit card product[s] at the *same* elevated discount rate, which vastly exceeded the rate for comparable Visa, MasterCard or Discover products."

According to the plaintiffs, the vehicle of this compulsion is the "Honor All Cards" provision contained in the Card Acceptance Agreement. Under the Agreement, a merchant does not contract to accept any one Amex product as a form of payment. Rather, the Agreement applies

> to your acceptance of American Express© Cards .... *American Express Card(s)* ... shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc., or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo.

The plaintiffs assert that, by means of the "Honor All Cards" provision, merchants are faced with the choice of paying supracompetitive merchant discount fees (i.e., fees above competitive levels) on Amex's new mass-market products or "inevitably los[ing] a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others" who are the traditional users of Amex charge cards. This, the plaintiffs claim, amounts to an illegal "tying arrangement," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[6]

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[6] In a definition that has become classic, the Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5-6, 78

**E. The District Court's Decision.** Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 15, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re American Express Merchants Litig.*, 2006 WL 662341, at *4. The district court proceeded to consider the plaintiffs' contention that enforcement of the class action waiver would effectively strip them of the ability to assert their claims because "each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5000." *Id.* The district court expressed skepticism that this argument amounted to much:

> Plaintiffs' contention . . . that the costs of individual arbitration would eclipse the value of any potential recovery, ignores the statutory protections provided by the Clayton Act. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. 15(a) . . . .

*Id.* at *5 (footnote omitted).

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S.Ct. 514, 2 L.Ed.2d 545 (1958). A tying arrangement will violate Section 1 of the Sherman Act if "the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 462, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (internal quotation marks omitted).

This observation was quickly reduced to dicta, however. This is because the district court proceeded to hold that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established." *Id.* at *6. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration.

The plaintiffs also made two additional arguments before the district court. First, they contended that the class action waiver could not be enforced against those named plaintiffs who had contracted with Amex before the 1999 inclusion of the mandatory arbitration clause in the Card Acceptance Agreement. Amex purportedly informed these plaintiffs of the inclusion of the clause by means of an amendment to the Agreement. The plaintiffs contended, however, that (1) Amex had not produced sufficient evidence of the fact that the "pre-1999 plaintiffs" had ever received this amendment and (2) even if the plaintiffs had received the amendment, their original merchant contract with Amex did not allow the subsequent introduction of an arbitration clause. The district court rejected these arguments, concluding that the plaintiffs had not successfully rebutted the presumption of mailing to which Amex is entitled and that the arbitration amendment constituted a reasonable addition to the original merchant contract. *Id.* at *7-*9.

Second, the plaintiffs contended that the class action waiver was not enforceable against named plaintiffs and class members who were citizens of Califor-

nia because the waivers were unconscionable under that State's law. The district court concluded that this was "a substantive matter[] to be raised before the arbitrator." *Id.* at *9.

The district court concluded as follows: "[Amex's] motion to compel arbitration of all claims against it is granted. Since this Court finds that all of plaintiffs' claims against [Amex] are subject to arbitration, it further orders that plaintiffs' cases against [Amex] be dismissed." *Id.* at *10. The plaintiffs filed a timely appeal.

## ANALYSIS

Before we proceed to the weighing of the parties' arguments, we think it would be helpful to set forth some of the issues which are not raised on this appeal. Specifically, these are issues which are commonly raised in the general run of arbitration cases with which this Court is faced.

First, the plaintiffs are not contending that the mandatory arbitration clause contained in the Card Acceptance Agreement is not broad enough to cover their antitrust claims. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 175 (2d Cir.2004) (holding that antitrust claims were arbitrable under a broad arbitration clause even though the claims concerned "matters beyond the making of a particular contract between the parties and the performance of its terms"). Further, while they certainly do not deny that this case is one of considerable legal and evidentiary complexity, the plaintiffs do not argue that their claims are too complex to be properly handled in arbitration. *See id.* at 181 (rejecting argument that claims involving a "horizontal price-fixing conspiracy" were beyond the capabilities of an arbitral panel). Nor do the plaintiffs take issue with the dicta

in *JLM* to the effect that this Court would view "skeptically" any argument positing that the "assertion of class claims should serve as a bar or deterrent to sending" a case to arbitration. *Id.* at 180 n. 9. On the contrary, the plaintiffs expressly aver that they "are not averse to proceeding in a class-wide arbitration."[7] (Blue 29) The plaintiffs are therefore not seeking to revive "the ancient judicial hostility to arbitration" as a form of dispute resolution. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200 (2d Cir.1998). In asking us to hold that the class action waiver in the Card Acceptance Agreement is unenforceable, however, the plaintiffs are implicitly asking us to limit the principle that "many features of arbitration by contract, including . . . procedure and choice of substantive law," *Hall Street Assocs., LLC v. Mattel, Inc.*, — U.S. —, 128 S.Ct. 1396, 1404, 170 L.Ed.2d 254 (2008), are to be left to the discretion of the

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[7] It is apparent that "[c]lass arbitration is a swiftly growing phenomenon. In late 2003, the American Arbitration Association ('AAA') introduced procedures for class arbitrations .... As of September 27, 2007, the AAA was administering more than 190 class arbitrations, and from July 10, 2006 until September 27, 2007 alone, the number of AAA-administered class arbitrations increased by more than 50%." David S. Clancy & Matthew M.K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History," 63 *Bus. Law.* 55, 56 (2007). Clancy and Stein go on to argue that when Congress passed the Federal Arbitration Act, in 1925, it specifically envisioned arbitration as "something inherently prompt, inexpensive, and streamlined," and "did not expect that arbitrators would adjudicate anything like the modern class action ...." *Id.* at 61, 67. Although the argument that class proceedings in arbitration are incompatible with the Federal Arbitration Act is an intriguing one, we are presented with no such argument on this appeal.

contracting parties, unsupervised by judicial review.[8] Although we believe that it is a close question, we believe that the plaintiffs are correct.

**A. Jurisdiction.** Section 16(a)(3) of the FAA, 9 U.S.C. § 16(a)(3), provides that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." Because "an order compelling arbitration and dismissing a party's underlying claims is a 'final decision with respect to an arbitration,'" *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), there is no dispute that this Court has jurisdiction to hear the instant appeal.

**B. Who Should Decide Whether the Class Action Waiver is Enforceable?** The plaintiffs argue – and we do not see that Amex posits any argument to the contrary – that the district court erred in holding that the question of the class action waiver's enforceability is a matter for the arbitrator, not the court. This is plainly correct.

In *Buckeye Check Cashing, Inc. v. Cardegna*, the Supreme Court stated that

> [c]hallenges to the validity of arbitration agreements . . . can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. The other challenges the

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[8] The principle was limited by the Court itself in *Hall Street* which held that parties are not free to compose arbitration agreements which provide for a greater scope of federal court review of arbitral awards than that set forth in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, because this would be at odds with the FAA's "substantiat[ion of] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." 128 S.Ct. at 1405.

> contract as a whole, either on a ground that directly affects the entire agreement (*e.g.* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.

546 U.S. 440, 444, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citation omitted). The Court then held that if there is a challenge to "'the arbitration clause itself – an issue which goes to the making of the agreement to arbitrate – the federal court may proceed to adjudicate it. But [the FAA] does not permit the federal court to consider claims [which challenge] the contract generally.'" *Id.* at 445, 126 S.Ct. 1204 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

The plaintiffs are plainly challenging the Card Acceptance Agreement's arbitration clause insofar as they dispute the enforceability of its class action waiver and, by extension, the validity of the parties' agreement to arbitrate. Their "challenge is to the arbitration clause itself," *id.*, rather than to the entirety of the Card Acceptance Agreement.[9] This appeal therefore involves "a gateway dispute about whether the parties are bound by a given arbitration clause," a dispute which "raises a question of arbritrability for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (internal quotation marks omitted); *accord Kristian v. Comcast Corp.*, 446 F.3d

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[9] The plaintiffs' challenge to the enforceability of the class action waiver is distinct from any contention to the effect that Amex's alleged tying arrangement renders the entire Card Acceptance Agreement invalid. *See* Amex Brief at 49. The latter issue is not before us.

25, 55 (1st Cir.2006); *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 877 (11th Cir.2005).[10] We will therefore proceed to consider whether the class action waiver contained in the Card Acceptance Agreement is enforceable.

**C. The Enforceability of Class Action Waiver Provisions: General Considerations.** The FAA was "enacted . . . to replace judicial indisposition to arbitration," *Hall Street*, 128 S.Ct. at 1402, and is, as we acknowledged at the outset of this opinion, an expression of "a strong federal policy favoring arbitration as an alternative means of dispute resolution." *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir.2001). The favoring of arbitration is, however, somewhat tempered by the fact that "[a]rbitration is strictly a matter of contract." *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir.1995). Enhancing the federal policy favoring arbitration is therefore largely a matter of "mak[ing] arbitration agreements as enforceable as other contracts, *but not more so*." *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 369 (2d Cir.2003) (internal quotation marks omitted).

This principle is set forth in Section 2 of the FAA, 9 U.S.C. § 2, which provides that an agreement to

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[10] In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), the Supreme Court was faced with an arbitration agreement which was ambiguous as to whether it permitted arbitration proceedings to be conducted on a class basis. The Court concluded that this was a matter of contract interpretation which "should be for the arbitrator, not the courts, to decide." *Id.* at 453, 123 S.Ct. 2402. Here, we do not face an issue of contract interpretation; the Card Acceptance Agreement is unambiguous in forbidding arbitration to proceed on a class basis.

arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 is "the primary substantive provision" of the FAA which "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the" FAA. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). We join other Circuits that have evaluated arbitration clauses containing class action waivers under the federal substantive law of arbitrability. *See Gay v. CreditInform*, 511 F.3d 369, 394-95 (3d Cir.2007) (holding class action waiver to be enforceable under Section 2 of the FAA notwithstanding claim that waiver was unconscionable under state law); *Kristian*, 446 F.3d at 63 ("Although Plaintiffs' challenges to the enforceability of the arbitration agreements could be evaluated through the prism of state unconscionability law, we have chosen to apply a vindication of statutory rights analysis, which is also part of the body of federal substantive law of arbitration . . . ."). We conclude that the plaintiffs here have demonstrated that enforcement of the class action waiver in the Card Acceptance Agreement to cover their claims against Amex under federal antitrust statutes would be incompatible with the federal substantive law of arbitration.

We begin by recognizing that insofar as a plaintiff may be said to possess a "right" to litigate an action in federal court as a class action under Rule 23 of the Federal Rules of Civil Procedure, the right "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332, 100 S.Ct. 1166, 63 L.Ed.2d 427

(1980). Nevertheless, the Supreme Court has repeatedly recognized the utility of the class action as a vehicle for vindicating statutory rights. This is especially true with respect to the Court's recognition that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Thus, as the Court later opined, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)); *see also Roper*, 445 U.S. at 338, 100 S.Ct. 1166 ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise[, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."); *Shady Grove Orthope-*

*dic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 144 (2d Cir.2008) ("[C]lass actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("[T]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00.").

The Supreme Court has at least implicitly held that a provision in an arbitration agreement barring class procedures is not *per se* unenforceable because, as noted above, it held in *Bazzle* that the question of whether or not an ambiguous arbitration clause contained a class action ban was a matter for the arbitrator, not the court, to decide. 539 U.S. at 453, 123 S.Ct. 2402. Beyond this oblique ruling, however, the Supreme Court has yet to squarely face the question of whether or not there are conditions under which a class action ban would be incompatible with the FAA. But, as both parties here acknowledge, the Court has decided cases which involved matters which, if ancillary, are certainly pertinent to this question.

*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), involved a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Specifically, the plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. *Id.* at 23, 111 S.Ct. 1647. After the plaintiff had filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the

rules of the New York Stock Exchange ("NYSE"), to which the plaintiff had agreed to be bound when he became a registered securities representative. *Id.* at 23-24, 111 S.Ct. 1647.

The Court held that because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause was enforceable "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26, 111 S. Ct. 1647 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Even though the Court acknowledged that "the ADEA is designed not only to address individual grievances, but also to further important social policies," *id.* at 27, 111 S.Ct. 1647, the Court could discern no Congressional intent to preclude ADEA claims from being subject to arbitration. The Court also considered the plaintiff's argument to the effect "that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* at 32, 111 S.Ct. 1647. The Court rejected this contention:

> As the court below noted, however, arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide for collective proceedings. But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that

> individual attempts at conciliation were intended to be barred.

*Id.* (citations, internal quotation marks, and brackets omitted).

Amex directs our attention to the final sentence of this passage, and other courts have relied upon it in upholding mandatory arbitration clauses. Amex Brief at 19. In particular, the Third Circuit, in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir.2000), dealt with a claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* The plaintiffs argued that their class action claim in federal court was not subject to mandatory arbitration because TILA

> effectively create[s] an unwaivable right to bring a class action . . . . [In TILA,] Congress enacted a scheme in which the court hearing a class action could set a damage figure up to a certain amount for certain patterns of conduct. This judicial flexibility in imposing damages up to $500,000 only exists if a class action is allowed, as individual plaintiff claims are generally capped at $1,000. Therefore, a right of classes to a judicially crafted punitive remedy is lost if this court orders arbitration of Johnson's claims.

*Id.* at 377.

The Third Circuit held that "[t]his argument is unavailing in light of" *Gilmer*. *Id.* The court noted that *Gilmer* involved a claim under the ADEA, a statute which explicitly provides in its text for the bringing of class actions. *Id.* (citing 29 U.S.C. § 626(b)). In spite of this, the court concluded, "the Supreme Court still ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of the

class action remedy there." *Id.*; *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004) ("[W]e reject the [plaintiffs'] claim that their inability to proceed collectively [in arbitration] deprives them of substantive rights available under the [Fair Labor Standards Act.] The Supreme Court rejected similar arguments concerning the ADEA in *Gilmer* . . . .").

We cannot agree with this view of *Gilmer* because a collective, and perhaps a class action remedy, in fact *was* available in that case. As set forth above, the Supreme Court explicitly noted that the arbitration rules of the NYSE provided for the conduct of collective arbitration. 500 U.S. at 32, 111 S.Ct. 1647. At the time *Gilmer* was decided, the NYSE's rules may also have permitted arbitration claims submitted as class actions. *Compare* NYSE Rule 600(d) (2008) ("A claim submitted as a class action shall not be eligible for arbitration under the Rules of the Exchange.") *with* NYSE Rule 600 (1991) (containing no prohibition on class actions). The statement in *Gilmer* that the arbitration clause would be enforceable "even if" class remedies were available evidences that the Court itself was uncertain, but acknowledged the probability, that class action were feasible under the NYSE's rules. Moreover, it is dicta that does not apply here. The plaintiffs do not proffer the argument rejected in *Gilmer*, namely that the class action waiver is unenforceable merely because the relevant statute allows class actions. Rather, the conundrum presented by the instant appeal is more nuanced: whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to

preclude their bringing Sherman Act claims against Amex in *either* an individual or collective capacity.

After the Third Circuit's decision in *Johnson*, the Supreme Court came somewhat closer to this issue in *Green Tree Financial Corp.-Alabama v. Randolph*. That case also involved a claim under TILA and a consideration of the enforcement of a mandatory arbitration clause. The specific issue to be decided was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." *Green Tree*, 531 U.S. at 82, 121 S.Ct. 513. Specifically, the plaintiff argued "that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have had against [the defendants]." *Id.* at 90, 121 S.Ct. 513. The Court rejected this argument because the plaintiff had proved no more than that the asserted "risk" was hypothetical:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter .... The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative

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> to justify the invalidation of an arbitration agreement.

*Id.* at 90-91, 121 S.Ct. 513 (footnote omitted); *see also In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir.2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.").

Although the Court in *Randolph* declined to consider whether the arbitration agreement was unenforceable because it may have precluded the plaintiff from bringing her claims under TILA as a class action, 531 F.3d at 92 n. 7, courts have relied upon its holding to uphold such bans. *See In re Cotton Yarn Antitrust Litigation*, 505 F.3d at 285 ("This kind of uninformed speculation about cost falls far short of satisfying the plaintiffs' burden of proving that the costs of proceeding individually against the defendants would be prohibitive and thus would prevent them from effectively vindicating their statutory rights."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir.2003) ("In the present case, the Livingstons have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir.2002) ("Adkins makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much money is at stake for each individual plaintiff.").

**D. Is the Class Action Waiver in the Card Acceptance Agreement Enforceable?** *Randolph* is controlling here to the extent that it holds that

when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92, 121 S.Ct. 513. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden because they had "ignore[d] the statutory protections provided by the Clayton Act." *In re American Express Merchants Litigation*, 2006 WL 662341, at *5. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver.[11] The Card Acceptance Agreement therefore entails more than a speculative risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

This argument is compellingly set forth in an affidavit filed in the district court by Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French states that the purpose of his affidavit is "to provide an expert opinion concerning

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[11] "We review . . . mixed questions of law and fact either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir.2005) (internal citations omitted). The plaintiffs' estimated expert witness fees were essentially undisputed. We review de novo the district court's application of the Clayton Act to undisputed facts. *See Village of Grand View v. Skinner*, 947 F.2d 651, 656 (2d Cir. 1991) ("Because the issues presented on this appeal involve the application of a statutory standard to undisputed facts, the appropriate standard of review is de novo."). We note, however, that our ruling would not be different under a clearly erroneous standard.

the likely costs and complexity of an expert economic study concerning the liability and damages" relating to this action, and to compare this with "the potential recovery of damages by an American Express Card merchant with annual sales volume of $10 million or less, such as most if not all of the named plaintiffs in this litigation, and to provide my opinion as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." Dr. French continues:

> Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. In my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million .... In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $300 thousand to more than $2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that ... the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.
>
> An economic antitrust study ... is necessarily complex and costly because it involves investigating several antitrust liability and damages issues and, potentially involves numerous tasks and services. The antitrust liability and damages issues that an expert economist will study in this matter will likely include:

- defining the relevant tying and tied product markets and determining whether they are distinct;
- determining whether the defendant has market (monopoly) power in the tying product market, . . . ;
- determining whether the defendant has exercised its market (monopoly) power to enforce the tying arrangement;
- determining whether the tying arrangement has an anticompetitive effect in the tied product market;
- determining what the merchant fees would have been but for the alleged anticompetitive tying; and
- quantifying the dollar amount of damages to the plaintiffs as a consequence of the tying arrangement.

Dr. French then proceeds to consider the economic rationality of bringing an individual action against Amex in light of these substantial expert witness costs:

> Based upon publicly available information . . . I have estimated that a small merchant with $10 million of annual sales, on average, might calculate and expect $754 of economic damages for the year 2001, which is roughly the midpoint of the damage period covered by this litigation . . . . Multiplying the $754 damage figure by four, gives a rough estimate of $3,015 total damages for the whole four-year damage period, or $9,046 when trebled, assuming that the merchant's sales remain constant at $10 million for the four-year period.

> . . . The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled . . . . The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled.
>
> In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million.

In *Kristian*, the First Circuit found that expert affidavits similar to Dr. French's "demonstrat[ed] that without some form of class mechanism – be it class action or class arbitration – a consumer antitrust plaintiff will not sue at all." 446 F.3d at 58. We hold that the plaintiffs here have also demonstrated that their antitrust claims against Amex can, for all intents and purposes, only be pursued through the aggregation of individual claims, either in class action litigation or in class arbitration.

The district court, which held that the enforceability of the class action waiver in the Card Acceptance Agreement was a matter to be determined in arbitration, did not deal head on with Dr. French's affidavit. Dr. French's conclusion that "in a non-class action involving an individual plaintiff . . . even a relatively small economic antitrust study will cost at least several hundred thousand dollars" was essentially

uncontested. Instead of addressing this figure, the district court misinterpreted and misapplied the statutory protections available to the plaintiffs. Citing Section 4 of the Clayton Act, 15 U.S.C. § 15(a), the district court noted that a plaintiff who had established a Sherman Act claim against a defendant "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *In re American Express Merchants Litig.*, 2006 WL 662341, at *5; *see also Dambrosio v. Comcast Corp.*, No. Civ.A.03-6604, 2005 WL 3543794, at *16 (E.D.Pa. Dec.27, 2005) (asserting that Section 4 of the Clayton Act "expressly provides for the recovery of attorneys' fees and expenses, [thereby] making the arbitral forum accessible to individual plaintiffs and allowing them to vindicate the full range of substantive rights granted to them" under the federal antitrust laws), *vacated on other grounds*, 2006 WL 2058643 (E.D.Pa. Apr.12, 2006).

This is true, but, as the plaintiffs correctly point out, the Clayton Act simply does not solve their problem. Besides the fact that the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case here, there is an even more important legal consideration that the district court did not consider. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Supreme Court addressed fee-shifting for expert witnesses under Rule 54(d) of the Federal Rules of Civil Procedure in an antitrust case, holding that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b) . . . ." 482 U.S. 437, 439,

107 S.Ct. 2494 (1987).[12] We note that that figure is now set at a $40 per diem. Further, as the plaintiffs assert, there are no provisions "in the rules of any of the arbitral bodies designated [in the Card Acceptance Agreement] that would allow such costs to be awarded where they are not authorized by the applicable fee shifting statute." Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs.[13] Thus, Amex's reply to the effect that "[a]n arbitrator can award the same reasonable costs that are recoverable by statute," plainly does not solve the problem.

Amex also informs us that a putative antitrust class action challenging the "Honor All Cards" provision in the Card Acceptance Agreement has been brought in the U.S. District Court for the Southern District of New York by a merchant plaintiff who is apparently not subject to the class action waiver

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[12] Quoting *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338-39 (8th Cir.1982), Amex suggests that if an expert's findings prove "to be so 'crucial' and 'indispensable' that an arbitrator determines that the case absolutely could not have been pursued without them, the arbitrator might award such costs." Amex Brief at 28. We are skeptical, however, that an arbitrator might follow *Paschall* because it appears unlikely that its holding survives *Crawford Fitting Co.* *See Gilbert v. City of Little Rock, Ark.*, 709 F.Supp. 856, 862 (E.D.Ark.1987) (holding that *Paschall* is inconsistent with the holding of *Crawford Fitting* to the effect that expert witness fees are to be determined solely in accordance with 28 U.S.C. § 1821(b)).

[13] The plaintiffs' counsel has submitted a detailed affidavit which estimates that the cost of depositions and document management would exceed $300,000.

provision in the Agreement. *See The Marcus Corp. v. American Express Co.*, No. 04cv5432, 2005 WL 1560484 (S.D.N.Y. July 5, 2005). Further pointing out that the plaintiffs in that action are represented by the same counsel who represent the plaintiffs here, Amex speculates that "[p]resumably" the plaintiffs here, "the *Marcus* plaintiff, and their common attorneys and experts could reach an agreement as to how the experts' cost of preparation could be shared." This is an intriguing proposition, but we do not believe it can survive the application of the following provision of the arbitration clause in the Card Acceptance Agreement: "The arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Thus, any proposal that the plaintiffs share the services of expert witnesses employed in the *Marcus* action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with *anyone*.[14]

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[14] One of the amici makes the following suggestion: "Whatever costs the Merchant Plaintiffs might ultimately bear in procuring expert testimony in this case, those costs may be offset by the cost savings of conducting an arbitration proceeding, rather than an all-out federal trial." Brief of Business Roundtable at 16. But this misses the point. While it may be true that an individual arbitration brought by a plaintiff will likely cost less than a trial in federal district court, the fact remains that the plaintiffs have demonstrated to our satisfaction that *neither* an individual arbitration, *nor* an individual litigation would make any economic sense in light of the likelihood that expert fees far in excess of any likely individual recovery would need to be expended in either action.

Concluding that Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). This may be especially true with respect to private antitrust suits brought as class actions. *See* Dando B. Cellini, "An Overview of Antitrust Class Actions," 49 *Antitrust L.J.* 1501, 1506 (1980) ("I think it is obvious from the experience over the last fifteen years since the 1966 amendments to Rule 23 were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

In *Mitsubishi*, the Supreme Court held that there is by no means any necessary reason to prevent sending a Sherman Act claim to arbitration because "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 473 U.S. at 637, 105 S.Ct. 3346. The *Mitsubishi* Court recognized, however, that there might be instances in which an arbitration agreement contained provisions that would be unenforceable because they would prevent

a prospective litigant from vindicating its rights under the Sherman Act in an arbitral forum. Specifically, the plaintiff in *Mitsubishi* speculated that the choice-of-forum and choice-of-law clauses in the arbitration agreement at issue would effectively preclude the arbitrator from determining the plaintiff's substantive claims in accordance with the terms of the Sherman Act. The Court responded that it would not prevent the case from going to arbitration based upon mere conjecture as to what body of law the arbitrator would apply, but also continued as follows:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

*Id.* at 637 n. 19, 105 S.Ct. 3346.

We readily acknowledge that this statement is dicta, but it is nevertheless dicta grounded upon a firm principle of antitrust law to the effect that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *see also Minnesota Mining and Mfg. Co. v. Graham-Field, Inc.*, No. 96cv3839, 1997 WL 166497, at *3 (S.D.N.Y. Apr.9, 1997) ("GFI could not

have waived [its antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

We believe that one of the amici has correctly applied the principle just set forth to the facts of the instant case:

> Plaintiff[s]-appellants' antitrust claims are complex and plaintiffs established for the record below that if they are precluded from participating in a collective action, the cost to each individual consumer to prosecute his or her claim is prohibitive relative to the consumer's potential recovery. If the collective action waiver is enforced, American Express will be shielded from liability, even where it may have violated the antitrust laws. Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. Because the class action waiver precluded the plaintiff[s]-appellants from enforcing their statutory rights, the arbitration provision is unenforceable.

Brief of American Antitrust Institute at 15; *see also Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir.2007) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims.").

We therefore hold that the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery. As already set forth, Section 2 of the FAA, 9 U.S.C. § 2, provides that an agreement to arbitrate

"shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

**E. Two Caveats.** We emphasize two important limitations upon our holding. First, our decision in no way rests upon the status of the plaintiffs as "small" merchants. The plaintiffs repeatedly refer to themselves as "small merchants" and as "small businesses." But Amex is correct when it counters that the plaintiffs "undoubtedly hope that, by labeling themselves as 'small,' they can benefit from one line of case law where individual *consumers* have alleged that arbitration agreements were imposed as a result of unequal bargaining power." *See, e.g., Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir.2008) (holding class action waiver contained in cellular telephone unconscionable under Washington law); *Skirchak*, 508 F.3d at 60 (holding class action waiver in employment agreement unconscionable under Massachusetts law); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir.2007) (holding class action waiver in cellular phone contract unconscionable under California law). We do not follow these cases because they all rely on findings of unconscionability under state law, while we have relied here on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability. Applying the latter, we have found that plaintiffs have demonstrated the necessity of some class mechanism in order to bring their claims against Amex. This demonstration is in no way dependant on the "size" of any or all of the merchant

plaintiffs; it depends upon a showing that the size of the recovery received by *any* individual plaintiff will be too small to justify the expenditure of bringing an individual action.

Second, we stress that we do not hold here that class action waivers in arbitration agreements are *per se* unenforceable. We also do not hold that they are *per se* unenforceable in the context of antitrust actions.[15] Rather, we hold that *each* case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24, 103 S.Ct. 927. We believe that the Eleventh Circuit has posited something like the correct approach:

> [T]he enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances. Relevant

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[15] We note that the Fourth Circuit, in *In re Cotton Yarn Antitrust Litigation*, has upheld the enforcement in an antitrust action of a collective action ban contained in a contract between commercial parties. The case presented a claim of antitrust conspiracy, and the court pointed out that a bar upon joining the two defendants, who were jointly and severally liable, did not preclude the arbitrability of the claim because "co-conspirators are not necessary parties; a plaintiff can prove the existence of a conspiracy in an action against just one of the members of the conspiracy." 505 F.3d at 284. The court also noted "[t]he absence of an evidentiary record on . . . the actual cost of individual proceedings and . . . about the ability of the corporate plaintiffs to bear those speculative costs." *Id.* at 285. Again, such a record exists in the instant case.

> circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.

*Dale*, 498 F.3d at 1224.

**F. The Plaintiffs' Other Claims.** Because we hold that the class action waiver in the Card Acceptance Agreement is unenforceable as to all plaintiffs under the federal substantive law of arbitration, the plaintiffs' contention that the waiver is not enforceable against named plaintiffs and class members who were citizens of California because the waivers are unconscionable under that State's law is moot. Similarly, the plaintiffs' appeal of the district court's holding that the class action waiver could be enforced against those named plaintiffs who had contracted with Amex before the 1999 inclusion of the mandatory arbitration clause in the Card Acceptance Agreement is also moot.

**G. Relief.** Because the plaintiffs have declared themselves amenable to proceeding to arbitration, we need not consider whether the class action waiver in the Card Acceptance Agreement is severable from the remainder of the arbitration provision contained therein. Further, in light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand to the

district court to allow Amex the opportunity to withdraw its motion to compel arbitration.

## CONCLUSION

The decision of the district court is REVERSED. We REMAND to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Master File No. 03 CV 9592 (GBD)

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION

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GEORGE B. DANIELS, DISTRICT JUDGE:

American Express Company and American Express Travel Related Services Company, Inc., (collectively "American Express") move to compel arbitration of plaintiffs' claims and to dismiss these related actions consolidated for pretrial purposes or stay them pending arbitration.[1] American Express also moves to intervene and to dismiss in favor of arbitration the claims of plaintiffs in the separate case filed by plaintiffs against the banks entitled *National Supermarket Association, Inc., et al. v. MBNA America Bank, N.A., et al.* ("*National Supermarket*").[2] The bank defendants in National Supermarket move to dismiss the claims of plaintiffs in favor of arbitration or, in the alternative, to stay the action pending the

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[1] The consolidated cases are: *Italian Colors Restaurant, et al. v. American Express Co., et al.*, 03 cv 9592; *Cohen Rese Gallery, Inc., et al. v. American Express Co., et al.*, 03 cv 10271; *DFR Jeweler Corp. v. American Express Co., et al.*, 03 cv 9517; *Chez Noelle Restaurant v. American Express Co., et al.*, 04 cv 266; *Mascari Enterprises v. American Express Co., et al.*, 04 cv 366; and *Mims Enterprises, Inc. v. American Express Co., et al.*, 04 cv 1558.

[2] *National Supermarket Association, Inc., et al. v. MBNA America Bank, N.A., et al.*, 04 cv 10318, is also consolidated for pretrial purposes. Plaintiffs in *National Supermarket* are also plaintiffs in a number of the other consolidated cases.

arbitration of the related claims against American Express. Finally, the plaintiffs in *Cohen Rese Gallery, Inc., et al. v. American Express Co., et al.* ("*Cohen Rese*"), who are California merchants, move for partial summary judgment on the fifth claim for relief set forth in their amended complaint.[3]

American Express's motion to compel arbitration is granted, and plaintiffs' claims against American Express are dismissed. American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in *National Supermarket* is denied. Defendants' MBNA America Bank, N.A., MBNA Corporation, Citibank (South Dakota), N.A., and Citigroup, Inc. ("bank defendants") motion to dismiss the claims in *National Supermarket* is denied. The bank defendants' motion to stay the action in *National Supermarket* pending the arbitration of related claims against American Express, is granted. Finally the *Cohen Rese* plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice.

## BACKGROUND[4]

Plaintiffs are merchants who accept defendant American Express's payment card products. They can be divided into two different geographic groups:

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[3] Claim five asserts that the defendants are in violation of the California Unfair Competition Law by forcing small merchants to waive the right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express through the collective action waivers in the merchant contracts.

[4] The factual background underlying these actions is set forth in greater detail in the related case of *Marcus Corp. v. American Express*, No. 04 Civ. 05432 (S.D.N.Y. July 6, 2005) (denying defendants' motion to dismiss).

those plaintiffs whose primary place of business is in the state of New York ("New York merchants"), which includes Italian Colors Restaurant,[5] ("Italian Colors"), DRF Jewelers Corp., ("DRF"), Chez Noelle Restaurant, ("Chez Noelle"), Mascari Enterprises, ("Mascari"), and Mims Enterprises, Inc., ("Mims"); and those plaintiffs based in California ("California merchants"), Cohen Rese Gallery, Inc., ("Cohen Rese"), Il Forno, Inc., ("Il Forno"), and Mai Jasmine Corp., ("Mai Jasmine"). Each merchant plaintiff contracted with American Express to accept its corporate, charge, and credit cards.[6]

American Express and its competitors Visa, MasterCard, and Discover collectively dominate the payment card industry.[7] Visa and MasterCard operate as joint ventures with the banks that issue their payment cards to consumers. American Express, by contrast, has until recently issued payment cards directly to the consumer, without partnering with banks. Having accepted a customer's payment card, merchants tender requests for payment to American

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[5] Plaintiff Italian Colors Restaurant consists of a previously consolidated group of New York merchants, including Phuong Corp., Bunda Starr Corp., 492 Supermarket Corp., and National Supermarkets Association, Inc.

[6] A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

[7] The payment card industry has been extensively discussed in recent litigation. Undisputed industry facts cited in this order are derived from *United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004).

Express or, in the case of Visa and MasterCard, to the card-issuing bank.[8] Both the Visa/MasterCard and American Express models derive revenue by withholding a "merchant discount fee" from each tendered transaction. Plaintiffs allege that American Express charges a supra-competitive 3% merchant discount fee that greatly exceeds the fee charged by Visa and MasterCard. Plaintiffs contend that this supra-competitive fee can be sustained only through enforcement of an Honor All Cards ("HAC") provision, included in every merchant contract, that unlawfully ties American Express's charge and credit card services in violation of § 1 of the Sherman Act.[9]

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[8] In 2003, the Second Circuit affirmed a ruling that Visa and MasterCard violated antitrust statutes by colluding to require that their credit card-issuing bank partners refuse to issue American Express products; this collusion had effectively barred American Express from the credit card market. Prior to the resolution of the Department of Justice ("DOJ") litigation, Visa and MasterCard collectively controlled upwards of 90% of the credit card market. Since obtaining competitive access to card-issuing banks, however, American Express has moved aggressively into the market while maintaining its position as the leading issuer of corporate and consumer charge cards in the United States. Since the resolution of the DOJ litigation, American Express has negotiated card-issuing agreements with two of the nation's largest card-issuing banks, MBNA and Citibank.

[9] A typical tying arrangement is "an agreement by a party to sell one (tying) product but only on the condition that the buyer also purchases a different (or tied) product." *Eastman Kodak Co. v. Image Tech. Svcs., Inc.*, 504 U.S. 451, 461-62 (1992) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958)). The Supreme Court identifies the "essential characteristic" of an unlawful tying arrangement as "the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all,

Put simply, merchants who choose to accept the charge card must agree to accept all American Express cards.[10]

The merchant contract, or Card Acceptance Agreement ("Agreement"), is a 'form contract,' such that merchants do not negotiate its terms with American Express. Since 1999, American Express has included an arbitration provision in the Agreement. It requires arbitration of all claims "arising from or relating to this Agreement and/or the relationship resulting from this Agreement," upon the election of either party. 2001 American Express Card Acceptance Agreement, Defs.' Ex. A. The arbitration provision reads, in relevant part:

> For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement . . .
>
> This section sets out the circumstances and procedures under which Claims may be arbitrated instead of litigated in court . . .
>
> Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which

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or might have preferred to purchase elsewhere on different terms." *Jefferson Parish v. Hyde*, 466 U.S. 2, 12 (1984).

[10] "*American Express Card* or *Card* shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc. or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo." 1999 American Express Card Acceptance Agreement, Pls.' Ex. 2, Decl. of Noah Shube.

the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (*NAF*), JAMS/ Endispute (*JAMS*), or the American Arbitration Association (*AAA*), as selected by the party electing to use arbitration. If a selection by one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

In addition to prescribing binding arbitration of all claims, the Card Acceptance Agreement imposes a collective action waiver that precludes merchants from bringing or participating in class-wide actions regarding issues subject to arbitration. The provision reads, in relevant part:

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THE CLAIM, OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PROVIDED IN THE CODE OR PROCEDURES OF THE NAF, JAMS, OR AAA, AS APPLICABLE. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

The Card Acceptance Agreement also includes a New York choice of law provision that reads:

> THIS AGREEMENT WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO AGREEMENTS NEGOTIATED, EXECUTED AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK.

The complaints filed by the New York and California plaintiffs are largely identical, with slight variance in the number and type of claims.[11] All plaintiffs state three claims against American Express under Section 1 of the Sherman Act: 1) unlawful tying of charge card services and credit card services; 2) unlawful tying of corporate card services and credit card services; and 3) unlawful tying of charge or corporate card services and debit card services. Each New York plaintiff also states an additional claim under Section 2 of the Sherman Act, alleging that American Express maintains a monopoly by imposing a collective action waiver in each of its merchant contracts. Certain New York plaintiffs[12] also state a common law claim of unjust enrichment, alleging that the imposition of the supra-competitive merchant discount fee conferred an illegal benefit on American Express. California plaintiffs Cohen Rese,

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[11] Plaintiffs in the related case of *National Supermarket* have separately alleged that the bank defendants 1) conspired to violate section 1 of the Sherman Act by furthering the alleged tying by American Express of corporate charge card and credit card services, and 2) aided and abetted American Express's alleged violations of section 1 of the Sherman Act by rendering assistance to American Express in its alleged tying of corporate charge card and credit card services.

[12] DRF, Chez Noelle, Mascari, and Mims.

Il Forno, and Mai Jasmine additionally claim that the collective action waivers violate California's Unfair Competition Law.

DISCUSSION

American Express moves pursuant to 9 U.S.C. § 1 et seq. and Fed.R.Civ.P. 12(b) to compel plaintiffs to arbitrate their claims, and asks that this court either dismiss plaintiffs' complaints or stay the proceedings pending arbitration. Under the Federal Arbitration Act ("FAA"),[13] a district court may dismiss or stay proceedings if it finds a valid arbitration agreement exists and may compel arbitration when a party refuses to comply with that agreement. 9 U.S.C. §§ 3-4.

"The question of 'substantive arbitrability' is for the court not for the arbitrator to decide." *Livingston v. John Wiley & Sons, Inc.*, 313 F.2d 52, 55 (2d Cir. 1963) (citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)). In order to determine whether or not a particular dispute is arbitrable, a court must decide "whether the parties agreed to arbitrate, and if so, whether the scope of that agreement encompasses the asserted claims." *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45 (2d Cir. 1993) (quoting *David L. Threlkeld & Co. v. Metallgesellschafr Ltd.*, 923 F.2d 245, 149 (2d Cir. 1991)). While there is a strong federal policy favoring arbitration, a party may only be compelled to arbitrate a dispute to the extent he or she has agreed to do so. *Bell v. Cedent Corp.*, 293 F.3d 563,

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[13] The Arbitration Provision expressly states that the parties' agreement to arbitrate "is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act." *See* Cathryn A. Snyder Decl., Ex. B and D; Donald Blumenthal Decl., Ex. A.

566-67 (2d Cir. 2002); *John Hancock Life Ins. v. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001). Where the scope of the arbitration agreement is ambiguous, any doubt should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "Another way of expressing this is to say that arbitration must not be denied unless a court is positive that the clause it is examining does not cover the asserted dispute." *Spear, Leeds & Kellogg v. Central Life Assur. Co., et al.*, 85 F.3d 21, 28 (2d Cir. 1996) (citing *AT&T Technologies, Inc. v. Communications Workers of America, et al.*, 475 U.S. 643, 650 (1986)). Absent some ambiguity, however, it is the language of the contract that defines the scope of disputes subject to arbitration. *Equal Employment Opportunity Comm. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

American Express contends that plaintiffs are obliged to arbitrate their claims pursuant to the arbitration provision in their merchant contracts. In opposition, plaintiffs argue, *inter alia*, that to arbitrate their anti-trust claims individually would impose such punishing costs as to preclude vindication in that forum. All plaintiffs also argue that Claim IV of their amended complaints, which challenges the imposition of the collective action waiver provisions as an anti-trust violation in its own right, is inherently inarbitrable. The California plaintiffs, in their motion for partial summary judgment, claim that American Express's imposition of the collective action waiver provisions violated the California Unfair Competition Law by forcing small merchants to waive their right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express. Those plaintiffs

who signed merchant contracts prior to 1999 (the "pre-1999 plaintiffs")[14] deny having received defendant's mailing of that year imposing the arbitration and collective action waiver provisions. The pre-1999 plaintiffs further claim that the change-in-terms clause of their original contracts did not authorize the addition of an arbitration provision.

A. Enforceability of the Arbitration Agreement

The FAA established a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). The FAA instructs courts that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2005). Congress enacted the FAA for the purpose of "revers[ing] the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the United States Supreme Court directed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 473 U.S. 614, 626 (1985); *see also Paine Webber, Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996). Thus, courts are to "construe arbitration clauses as broadly as possible." *Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (quoting *Collins & Aikman Prod. Co. v. Build-*

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[14] The pre-1999 plaintiffs are Italian Colors, Bunda Starr, Chez Noelle, Mascari, Il Forno, and 492 Supermarket Corp. *See* Snyder Decl. at 3-6.

*ing Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995) (The parties were required to submit to arbitration "any claim or controversy arising out of or relating to th[e] agreement." The Second Circuit Court of Appeals found this to be "the paradigm of a broad clause," and further held that the claims at issue there were "presumptively arbitrable" pursuant to the clause)).

The arbitration provision in the merchant plaintiffs' card acceptance agreements is also a paradigmatically broad clause, thereby justifying a presumption of arbitrability. *See Oldroyd*, 134 F.3d at 76 (enforcing a clause requiring arbitration of "[a]ny dispute, controversy or claim arising under or in connection with" appellee's employment agreement); *Mehler v. Terminex Int'l Co. L.P.*, 205 F.3d 44, 49 (2d Cir. 2000) ("There is no dispute that the arbitration clause at issue is a classically broad one. . . . The clause provides for arbitration of 'any controversy or claim between [the parties] arising out of or relating to' the Agreement."). Plaintiffs' claims fall within the broad scope of the arbitration provision of the merchant Card Acceptance Agreement which covers "any claim, dispute or controversy between you and us arising from or relating to this Agreement." Snyder Decl., Ex. B and D; Blumenthal Decl., Ex. A. The Agreement applies to claims "based upon contract, tort, intentional tort, statutes, regulations, common law and equity." *Id.* The arbitration clause at issue here is enforceable absent an exception to the strong policy in favor of enforcing arbitration agreements.

1. The Costs of Individual Arbitration

Plaintiffs contend that the arbitration clause, which includes the contractual prohibition on collective action, should not be enforced. In order to effectively arbitrate their anti-trust claims under the ex-

isting contractual rubric, plaintiffs argue that each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5000. Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 1-7. Plaintiffs seize upon the United States Supreme Court's suggestion in *Green Tree Corp. v. Randolph* that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating . . . federal statutory rights in the arbitral forum." 531 U.S. 79, 90 (2000). Plaintiffs, however, misconstrue the nature of the judicial inquiry into arbitration costs to which the Supreme Court alludes in *Green Tree* and *Gilmer*. A litigant seeking to evade a contractual arbitration clause must "show a likelihood that he or she will be responsible for significant arbitrators' fees, *or other costs which would not be incurred in a judicial forum*. *Ball v. SFX Broadcasting, Inc.*, 165 F.Supp.2d 230, 240 (N.D.N.Y. 2001) (emphasis added); *see also Bradford v. Rockwell Semiconductor*, 238 F.3d 549, 556 (4th Cir. 2001) (finding that the "crucial inquiry" is whether "the arbitral forum in a particular case is an adequate and accessible substitute to litigation . . ."). Plaintiffs neither allege nor present evidence that arbitration would be any more costly than litigation.

Specifically, plaintiffs argue that "in the absence of the Collective Action Waivers, the small merchant plaintiff may vindicate its statutory rights by joining its claims with those of other merchants and pooling the costs of litigation (or attracting counsel willing to advance such costs.) In the presence of the Collective Action Waivers, the small merchant flatly cannot vindicate its statutory rights." Pls.' Memo. in Opp. to Mot. to Compel Arbitration at 2. Plaintiffs present

an affidavit from a "professional economist with substantial experience with individual and class action antitrust litigation" who asserts that "it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million." Decl. of Gary L. French, Ph.D, Pls.' App. of Decls. and Exs. in Opp. to Compel Arbitration, Ex. 5.

Plaintiffs' contention, however, that the costs of individual arbitration would eclipse the value of any potential recovery, ignores the statutory protections provided by the Clayton Act. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[15] 15 U.S.C.A. 15(a) (2005); *see Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting, in a RICO action, plaintiff's argument that a collective action waiver was un-

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[15] Plaintiffs do not dispute that the full extent of remedies under the Clayton Act would be available in arbitration by any one of the contractually identified arbitrators (the National Arbitration Forum, JAMS/Endispute, and the American Arbitration Association). *See, e.g., In re Universal Service Fund Telephone Billing Practices Litigation*, 300 F.Supp.2d 1107, 1137 (D.Kan. 2003) ("*Universal Service Fund I*") (enforcing a class action waiver in an arbitration provision in a case which involved anti-trust claims and noting that "[there is no] irreconcilable conflict between a ban on class actions and the substantive rights provided by [the Sherman and Clayton Acts]. Congress already provided ample statutory incentives for plaintiffs to vindicate their rights under those statutes by, for example, being able to recover treble damage and attorneys fees . . .").

enforceable because "without the class action vehicle, [plaintiff] will be unable to maintain her legal representation given the small amount of her individual damages."); *see also Plant v. Blazer Fin. Svcs.*, 598 F.2d 1357, 1365-66 (5th Cir. 1979) (holding, in a Truth in Lending Act action, that "[a]s a practical matter, the award of attorney's fees is a critical and integral part of this section"); *accord Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) (holding, in a TILA action, that "while arbitrating claims that might have been pursued as part of class actions potentially reduces the number of plaintiffs . . . arbitration does not eliminate plaintiff incentives to assert rights under the Act").

Although plaintiffs claim that the arbitration and collective action waiver provisions of their contracts combine to "give Amex a 'free pass'" by discouraging litigation, the very statute under which they bring suit provides sufficient financial incentive to pursue their claims in the form of treble damages, costs, and attorneys' fees. Moreover, plaintiffs' attack on the enforceability of the collective action waivers is not an argument against arbitrability, but an argument against enforcing the collective action waiver provisions, whether the claims proceeded in arbitration or court.[16] Accordingly, plaintiffs' opposition to arbitration because of the collective action waiver provisions, on the theory that the costs preclude vindica-

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[16] "The sin of the agreements that Amex has imposed upon the small merchant plaintiffs is not that they mandate arbitration at all; it is that they bar collective action. If the arbitration clauses allowed for a class-wide arbitration, then there would not be a 'cost differential between arbitration and litigation in court . . . [that] is so substantial as to deter the bringing of claims.'" Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 11 (internal citations omitted).

tion of individual plaintiff's statutory rights, is unpersuasive.

2. Arbitrability of Plaintiffs' Anti-Trust Claim

In claim IV of plaintiffs' respective amended complaints, they "allege that the imposition of the arbitration clause *with* its Collective Action Waivers thus constitutes an illegal contract in restraint of trade and an unlawful monopoly maintenance device, under §§ 1 and 2 of the Sherman Act." Pls.' Mem. in Opp. to Mot. to Compel Arbitration, 16 (emphasis added). Plaintiffs' contend that this claim is inherently inarbitrable because it "directly challenges the legality of the very clause that would support sending the case to arbitration in the first place." *Id.* Again, plaintiffs are actually challenging the enforcement of the collective action waivers, rather than making an argument about inherent inarbitrability. Indeed, arbitration agreements containing class action waivers are not inherently unenforceable as anti-competitive. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637-38 (4th Cir. 2002); *Randolph v. Green Tree Financial Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 378 (3d Cir. 2000); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553 (7th Cir. 2003); *Universal Service Fund I*, 300 F. Supp. at 1137 (concluding that the "inability to bring a class action . . . cannot by itself suffice to defeat the strong congressional preference for an arbitral forum").

The enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability is established. *See Buckeye Check Cashing, Inc. v. Cardegna et al.*, 126 S. Ct. 1204, 1209 (2006) ("[U]nless

the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 396-97, 404-06 (1967) (holding that an arbitrator should resolve a claim of "fraud in the inducement of the contract generally" since "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate"); *Campaniello Imports, Ltd. v. Saporiti Italia S.P.A. et al.*, 117 F.3d 655, 667 (2d Cir. 1997). Moreover, procedural questions, which grow out of the dispute and bear on its final disposition, are presumptively not for the judge, but for an arbitrator to decide. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

In addition, the United States Supreme Court has cautioned against the use of anti-trust defenses to contract actions. *See Kelly v. Kosuga*, 443 F.2d 783, 785-6 (1959) ("[t]he plea of illegality [of a contract] on violation of the Sherman Act has not met with much favor in this Court"). The Supreme Court made clear that a plaintiff may raise an anti-trust defense to a contract only where enforcement "would make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 81 (1982). In *Viacom Inter'l, Inc. v. Tandem Productions, Inc.*, the Second Circuit Court of Appeals explained the Supreme Court's concern "that the successful interposition of anti-trust defenses is too likely to enrich parties who reap the benefits of a contract and then seek to avoid the corresponding burdens." 526 F.2d 593, 599 (2d Cir. 1975).

Plaintiffs further claim that if this Court compels arbitration of their anti-trust claim, the Court will be party to defendant's alleged anti-trust violation, i.e. the enforcement of the Honor All Cards provision. However, the collective action waiver does not apply simply to the Honor All Cards provision. According to the merchant contract, plaintiffs may not engage in collective litigation or arbitration with regard to *any* claims arising out of *any terms* of the contract, and not simply when challenging the Honor All Cards provision. In ordering arbitration of plaintiffs' Sherman Act claim in accordance with the language of the contract, this Court is enforcing a binding agreement entered into by the parties, rather than acting as a party to any of the alleged anti-trust actions on the part of defendant. Plaintiffs offer no persuasive argument why an arbitrator cannot adequately consider and resolve all issues of enforceability of the terms of the contract, including plaintiffs' claims regarding the collective action waivers. All of plaintiffs' claims, including their anti-trust claim, are therefore arbitrable.

3. The pre-1999 Plaintiffs, the Change-in-Terms Provision, and the 1999 Amendment

Further contesting defendant's motion to compel arbitration, the pre-1999 plaintiffs contend that 1) the change-in-terms provision in their original merchant contracts with defendant did not allow the later introduction of an arbitration clause, and 2) that, despite discovery on the issue, defendant has failed to establish that the pre-1999 plaintiffs received the mailing imposing the arbitration clause in 1999. The change-in-terms clause in the pre-1999 plaintiffs' merchant contracts provides: "[American Express] has the right to amend this agreement at

any time. We will notify you in writing at least ten (10) days in advance. If the changes are unacceptable to you, you may terminate this agreement . . ." Snyder Decl., Ex. A. The parties do not dispute that in 1999 American Express mailed an arbitration agreement amendment to thousands of contracting merchants. The pre-1999 plaintiffs, however, dispute that they received this mailing.

Plaintiffs draw this court's attention to *Stone v. Golden Wexler & Sarnese, P.C.*, a recent case that invalidated an arbitration agreement added to a contract via mailing. 341 F. Supp. 2d 189 (E.D.N.Y. 2004). The *Stone* court found the supplementary arbitration agreement invalid on the ground that the change-in-terms provision[17] in the original contract was drafted in such a way that the consumer plaintiffs could not "have anticipated that the Bank would change the method and forum for resolving disputes." *Id.* at 197. Since the contract as a whole lacked any mention of terms relating to dispute resolution, the court found that an arbitration agreement was not reasonably within the "universe of terms which could be altered or affected pursuant to the clause." *Id.* at 198. In a similar case, an Eastern District of Pennsylvania court held a supplementary arbitration

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[17] The Change in Terms provision at issue in the *Stone* case between consumers and the Bank read in pertinent part: "We may amend or change any part of your Agreement, including the periodic rates and other chargers, or add or remove requirements at any time . . . Changes to the annual percentage rate(s) will apply to your account balance from the effective date of the change . . . Changes to fees and other charges will apply to your account balance." *Stone*, at 197. The surrounding sections of the Customer Agreement in *Stone* dealt with such topics as credit limits, membership fees, periodic statements, and finance charges. *Id.* at 197-98.

agreement void when the terms of the original contract failed to "alert a consumer to the fact that [defendant] might later impose a term abrogating their rights." *Perry v. FleetBoston Fin. Corp.*, No. 04-507, 2004 U.S. Dist. LEXIS 12616, at *13 (E.D.P.A. July 6, 2004) (noting elsewhere that "no mention of dispute resolution – either in an arbitral or judicial forum – existed in their original Cardholder Agreements").

The change-in-terms clause in the instant case, however, when coupled with other terms in the pre-1999 plaintiffs' merchant contracts, rendered the arbitration amendment at issue a reasonable addition to the original contracts.[18] The original contracts[19] included several terms relating to disputes and their

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[18] In contrast to the *Stone* change in terms provision, American Express' pre-1999 merchant contracts stated in pertinent part: "We have the right to change this Agreement at any time. We will notify you of any change in writing at least ten (10) days in advance. If the changes are unacceptable to you, you may terminate this Agreement." *See* Snyder Decl., Ex. A, C, and E. The surrounding sections in addition to discussing the parameters of the parties' financial relationship also discuss topics such as bankruptcy, indemnification, compliance with laws, governing law, waiver, assignment, and terminating the agreement.

[19] American Express was only able to provide copies of the merchant contracts in existence on the date of their agreement for three of the six pre-1999 plaintiffs. The merchant contract in effect in 1993 when Italian Colors signed an agreement with American Express is Exhibit A of the Snyder Declaration; the 1989 contract applicable to Bunda Starr is Exhibit C of the Snyder Declaration; and the 1991 contract applicable to Mascari is Exhibit E of the Snyder Declaration. Copies of the contracts in effect for Chez Noelle in 1982, Il Forno in 1988, and 492 Supermarket Corp. in 1996 were not located. *See* Snyder Decl. at 4-5 ¶¶ 7, 9 and 12.

resolution, including: a section entitled "Full Recourse" which "means that we [American Express] are entitled to payment from you [the merchant] for amounts payable or paid to you" in the event of any disputed charges or non-compliance with the terms of the contract; a section entitled "Disputed Charges," explaining that the merchant must respond in writing to any "claim, complaint, or question about any charge" if American Express requests and that American Express will have the right to "Full Recourse" from the merchant if a cardmember continues to withhold payment after the merchant's reply and the "[c]ardmember has the right under applicable law" to do so; a section entitled "Indemnification," whereby the merchant agrees to indemnify American Express and others "from and against all damages, losses and expenses . . . including reasonable attorneys' fees and costs" in "any suit or claim" arising out of certain situations under the agreement; a provision terminating the Agreement if the merchant becomes insolvent or involved in bankruptcy proceedings; and a "Governing Law" section identifying New York law as governing the agreement. *See, e.g.*, Snyder Decl., Ex. A, C, and E.[20]

Since the pre-1999 merchant contracts contained provisions concerning the resolution of disputes, including sections pertaining to various legal proceedings such as bankruptcy and lawsuits in which the merchant would indemnify American Express and pay their attorneys' fees, the original contract sufficiently alerted plaintiffs that the defendants' might later amend the terms of the contract with respect to

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[20] The quoted sections can be found in the 1993 merchant agreement. Snyder Decl., Ex. A. Sufficiently similar provisions under various headings can be found in Exhibits C and E.

the resolution of disputes between the parties. *Cf. Perry*, 2004 U.S. Dist. LEXIS 12616 at *13 (holding that an "ambiguous" change in terms provision did not allow Fleet "to make previously uncontemplated, unilateral changes to the Cardholder Agreement" like the arbitration provision since "no mention of dispute resolution – either in an arbitral or judicial forum – existed in their original Cardholder Agreements"). The 1999 arbitration amendment was reasonably within the "universe of terms which could be altered or affected pursuant to the clause." *Cf. Stone*, 341 F. Supp. 2d at 198. Moreover, unlike *Stone*, and virtually all of the cases upon which it relies, the agreement at issue in the instant case is an agreement between commercial parties, rather than one involving consumers. If American Express' 1999 arbitration amendment was not acceptable to any of the plaintiff merchants, each merchant was free to terminate its relationship with American Express rather than be subject to the amendment. Instead, the plaintiffs elected to continue their relationship with American Express well after the arbitration amendment was put into place.

The pre-1999 plaintiffs also deny having received the 1999 arbitration amendment. In light of documents produced by both parties during discovery on the limited issue of receipt of the amendment, however, plaintiffs have not successfully rebutted the presumption of mailing to which defendants are entitled. Under New York law, "when . . . there is proof of the office procedure followed in a regular course of business, and these procedures establish that the required notice has been properly addressed and mailed, a presumption arises that notice was received." *Leon v. Murphy*, 988 F.2d 303, 309 (2d

Cir. 1993) (citing *Nassau Insurance Co. v. Murphy*, 46 N.Y.2d 828, 829-30 (1978)). Once defendants have adduced sufficient evidence to merit that presumption, "[t]he mere denial of receipt does not rebut [it]." *Leon*, 988 F.2d at 309.

Defendants have presented evidence that establishes the following: in 1999 American Express compiled a list of merchants from whom it had processed charges in the previous twelve months; each of the plaintiffs submitted charges during that time period; each of the plaintiffs conceded having received other mailings from American Express during the relevant time period; a professional mailing company determined that 99.7% of the roughly 1.5 million merchant addresses given it by American Express could be reached by mail; and an American Express executive affirmed via affidavit that normal business practices were employed in the course of the mailing. Plaintiffs do not dispute, or produce evidence to challenge, these assertions. Although plaintiffs deny having received the amendments, this self-serving assertion is insufficient to rebut the presumption of mailing. Plaintiffs' presentation of a handful of e-mails reflecting frustration on the part of several of defendant's employees who conducted the mailing is similarly inconclusive. *See Meckel v. Continental Resources*, 758 F.2d 811 (2d Cir.1985) ("There must be – in addition to denial of receipt – some proof that the regular office practice was not followed or was carelessly executed so the presumption that notice was mailed becomes unreasonable"). The arbitration amendment is therefore not rendered unenforceable for lack of receipt by the pre-1999 plaintiffs.

B. California's Unfair Competition Law

In the fifth claim of their amended complaint, the California plaintiffs claim that the collective action waivers violate California's Unfair Competition Law. Whether or not the defendants violated the California Unfair Competition Law by allegedly forcing small merchants to waive the right to participate in both class actions and class-wide arbitrations as a condition of doing business with American Express, is not a bar to sending all of the plaintiffs to arbitration pursuant to their contractual agreement with American Express. Rather, both the Sherman Act anti-trust claim and the California Unfair Competition claim are substantive matters to be raised before the arbitrator. *See, e.g., Zurich Ins. Co. v. Ennia General Ins. Co.*, 882 F.Supp. 1438, 1440 (S.D.N.Y. 1995) (holding that the issue of the law to be applied is a question for the arbitration panel, not the court once it determined that a binding agreement to arbitrate existed and the underlying dispute between the parties fell within its scope); *see also ATSA of Calif., Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983), *amended*, 754 F.2d 1394 (9th Cir. 1985) ("when parties agree to submit disputes to arbitration it is presumed that the arbitrator is authorized to determine all issues of law and fact necessary to resolve the dispute"). Indeed, in determining arbitrability, the court may not consider the merits of the parties' claims or the likelihood of success at arbitration, since the parties agreed to submit "any claim" to arbitration, not just those claims which the court determines are meritorious. *See Spear, Leeds & Kellogg*, 85 F.3d at 28-29. The California plaintiffs' con-

cede as much in their motion papers.[21] Therefore their motion for partial summary judgment is denied without prejudice and the issue may be raised in the arbitral forum.

## CONCLUSION

American Express's motion to compel arbitration of all claims against it is granted. Since this Court finds that all of plaintiffs' claims against American Express are subject to arbitration, it further orders that plaintiffs' cases against American Express be dismissed. *See Lewis Tree Serv., Inc. v. Lucent Technologies, Inc.*, 239 F. Supp. 2d 332, 340 (S.D.N.Y. 2002) (where "no useful purpose will be served by granting a stay" the action should be dismissed); *see also Wilson v. Wells Fargo Financial Acceptance, Inc.*, No. 3:02-0383, 2003 WL 1877336 (M.D. Tenn. Apr. 9, 2003) (dismissing case in favor of arbitration, and holding that "if all of the issues in dispute are governed by the arbitration agreement, then it would generally be an inefficient use of the court's docket to enter a stay, when the arbitration will likely be dispositive of all the issues").

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[21] "Finally this motion is not about arbitration. No one disputes the strong public policies supporting arbitration or the broad scope of the FAA. This motion, rather, is about Collective Action Waivers, which violate California law because they cut off plaintiffs' rights to participate in *both* class actions *and* class-wide arbitration. In this case, there would be no violation of applicable law if the defendants' agreements allowed small merchants either to participate in class actions or to take part in class-wide arbitrations. The arbitral organizations identified in the defendants' agreements with small merchants all have rules authorizing and governing class-wide arbitration." Pls.' Mem. in Sup. of Mot. for Partial Summary Judgment, 3 (emphasis in original).

American Express's motion to intervene and to dismiss the claims of plaintiffs against the banks in *National Supermarket* is denied. The bank defendants' motion to dismiss the claims in *National Supermarket* is denied. The bank defendants' motion to stay the action in *National Supermarket* pending the arbitration of related claims against American Express, is granted.

The *Cohen Rese* plaintiffs' motion for partial summary judgment on their fifth claim against American Express is denied without prejudice.

Dated: March 15, 2006

New York, New York

SO ORDERED:

/s/ GEORGE B. DANIELS

GEORGE B. DANIELS

United States District Judge

## STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

### 15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

### 15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

**9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

4. Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

**9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be

served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

April 20, 2009

Mr. Michael K. Kellogg
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M St., N.W., Ste. 400
Washington, DC 20036

Re: American Express Company, et al.
v. Italian Colors Restaurant, et al.
Application No. 08A913

Dear Mr. Kellogg:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on April 20, 2009 extended the time to and including June 1, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**William K. Suter**, Clerk
by HEATHER TRANT

Heather Trant
Case Analyst

[attached notification list omitted]

# OPPOSITION BRIEF

(4)

No. 08-1473

Supreme Court, U.S.
FILED
JUL 21 2009
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*,

*Petitioners,*

*v.*

ITALIAN COLORS RESTAURANT, on behalf of itself and all similarly situated persons, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Respondents would restate the questions presented as follows:

1. Whether this Court should disturb the uniform rule, adopted by *every* Circuit Court of Appeals to consider the issue, dictating that a collective action ban in an arbitration agreement may not be enforced, under *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), where a plaintiff can show that enforcement of that ban would in fact preclude the claimant from vindicating its federal statutory rights, as the plaintiffs demonstrated here by undisputed evidence?

2. Whether the plaintiffs in this case made a factual showing sufficient to satisfy the standard set forth by this Court in *Randolph* that a party may "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, [upon] showing the likelihood of incurring such costs," where plaintiffs made an undisputed showing below that: (i) each claimant will be forced to incur, under the specific arbitration agreement at issue in this case, costs that it would not be forced to incur in litigation, and (ii) those differential costs are so substantial, and so outstrip the amount each claimant seeks to recover, that the arbitration provision operates to preclude each plaintiff from vindicating its federal rights in the arbitral forum?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Italian Colors Restaurant; 429 Supermarkets Corp.; Bunda Starr Corp. d/b/a Buy-Rite; Chez Noelle Restaurant Corp.; Cohen Rese Gallery, Inc.; DRF Jewelers Corp.; Il Forno, Inc.; Mai Jasmine Corp.; Mascari Enterprises d/b/a Sound Stations; Mims Enterprises, Inc. d/b/a Mims Restaurant; National Supermarkets Association Inc.; and Phuong Corp. state the following:

No Respondent herein has a parent company, nor is there any publicly held company owning 10% or more of any one Respondent's stock.

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Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373 (2005).....1, 17, 29-30

## INTRODUCTION

The Circuit Courts of Appeal are uniform in recognizing that, under *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000) ("*Randolph*"), an agreement to arbitrate may not be enforced where a party demonstrates that it is likely, by dint of that agreement, to incur expenses sufficient to prevent it from vindicating its federal statutory rights. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits have all expressly reached this conclusion, as have district courts in the Ninth and Tenth Circuits. *See infra* at 16-24. Not one Circuit Court has held to the contrary, and Petitioners American Express Co. and American Express Travel Related Services Co., Inc. (collectively, "Amex") do not suggest that this Court should overturn this uniform body of case law.

The Second Circuit applied *Randolph*'s "prohibitive costs / vindication of rights" doctrine to invalidate the collective action ban in this case.[1] That ban, contained in the arbitration provision of Amex's standard form "Card Acceptance Agreement," prohibits a merchant claimant from joining its claims with those of any other merchant, and thereby pooling the costs incurred in prosecuting the

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[1] The provision is a ban on any type of collective action in the arbitration, and thus is most aptly termed a "collective action ban." Courts and commentators tend to regard as interchangeable the terms "class action waiver," "class action ban," "collective action ban" and "collective action waiver." *See* Pet. App. 2a; Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 376 n.15 (2005).

arbitration. The collective action ban forces the individual merchant to bear on its own all of the costs of pursuing its antitrust claims against Amex, including expert economists' fees, arbitrators' fees, filing fees, and so forth. The Second Circuit held that, in this complex antitrust case – where undisputed evidence showed that median damages sought were just over $5,000 (post trebling), and the non-recoupable costs alone (to say nothing of recoupable costs and fees) will necessarily total many hundreds of thousands of dollars or more – the contractual prohibition upon aggregating claims and pooling resources in the arbitration operates to impose upon the claimant a cost that "flatly ensures that no small merchant may challenge Amex's tying arrangement under the federal antitrust laws." Pet. App. 37a.

The Second Circuit thus joined *every other Circuit to consider this issue* in recognizing that, where a plaintiff can show that a collective action ban effectively prevents a claimant from vindicating its federal statutory rights in arbitration, the collective action ban is unenforceable. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) (finding collective action ban unenforceable where evidence of likely costs and potential recoveries "demonstrat[ed] that without some form of class mechanism – be it class action or class arbitration – a consumer antitrust plaintiff will not sue at all," and rights cannot be vindicated under *Randolph*); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (observing "[w]ithout the benefit of a class action mechanism, the subscribers would effectively be precluded from suing Comcast for a violation of 47 U.S.C. § 542. The cost of vindicating an individual subscriber's claim, when compared to his or her

potential recovery, is too great."); *see generally, In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir. 2007) ("[W]e have acknowledged that if a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.").

That the Circuits are uniform thus far in their treatment of collective action bans under *Randolph* is not in dispute. Amex argues, however, that the costs foisted upon a merchant claimant by a collective action ban should not qualify as a "prohibitive expense" under *Randolph*, because they do not represent costs that are unique to arbitration. Amex recognizes that under *Randolph*'s "prohibitive costs / vindication of rights" doctrine, an arbitration provision that would force a claimant to incur costs that effectively prevent it from vindicating its federal statutory rights is unenforceable (Pet. 18, 19, 26, 27), but Amex argues that the doctrine should only apply where the claimant is forced, under the arbitration clause at issue, to incur costs in "the arbitral forum that a litigant would not incur if he filed in court." Pet. 18. Amex's argument appears to be that only costs that are intrinsically "*unique* to arbitrations" – i.e., neutrals' fees and arbitration forum fees – should count as "prohibitive costs" under *Randolph*. *Id.* (emphasis in original).

American Express is mistaken. *Randolph*'s "prohibitive costs / vindication of rights" doctrine asks courts to compare ***all of the costs*** that a plaintiff stands to incur under a specific arbitration clause against ***all of the costs*** that the plaintiff would have incurred in litigation, and then to ask whether the differential precludes the plaintiff's ability to

vindicate its statutory rights. As Amex acknowledges, courts must "assess the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." Pet. 25-26 (quoting *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (internal quotation marks omitted).

The Circuit Courts have been uniform in rejecting a narrow construction under which only neutrals' fees and arbitration forum costs may be counted for purposes of a prohibitive costs analysis. Under *Randolph*, "[t]he issue is not the fact that [the] fees would be paid to the arbitrator . . . but rather whether the ***overall cost*** of arbitration . . . from the perspective of the potential litigant, is greater than the cost of litigation in court." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 664 (6th Cir. 2003) (quoting *Bradford*, 238 F.3d at 556) (citations and internal quotation marks omitted) (emphasis added). As the Fourth Circuit phrased it, "the proper inquiry . . . is ***not where the money goes but rather the amount of money that ultimately will be paid by the claimant.***" *Bradford*, 238 F.3d at 556 (emphasis added); *accord Kristian*, 446 F.3d at 54 (prohibitive costs include *all* fees and costs that a claimant must shoulder itself under a collective action waiver, including expert fees); *Dale*, 498 F.3d at 1220 (same). Further, as shown below, there is no logic or policy to support Amex's position.

It is likewise clear, as plaintiffs demonstrated below, that the collective action ban in this case is indeed "*unique* to arbitration," and imposes an "extra 'price of admission'" in the arbitral forum that a litigant "would not incur if he filed in court." Pet. 18

(emphasis in original). The contract is clear that a party may institute a proceeding in court, and the other party has an option to demand arbitration. Pet. App. 10a. If neither party insists on arbitration, then the action proceeds in court. And if the action proceeds in court, then under the terms of the Amex agreement, there is simply no ban on collective action. The collective action ban is only applicable "***if arbitration is chosen by any party with respect to a claim***." *Id.* (quoting contract language) (emphasis added). Likewise, the prohibition upon participating in a class action is expressly limited to claims in arbitration, as is the prohibition upon joining claims in one proceeding:

> There shall be no right or authority for any Claims to be ***arbitrated*** on a class action basis . . . . Furthermore, Claims brought by or against a [merchant] may not be joined or consolidated ***in the arbitration*** with Claims brought by or against any other [merchant] . . . .

*Id.* at 11a (emphasis added). The collective action ban, and its consequent imposition of prohibitive costs upon individual merchants, applies only in the arbitral forum.

In the end, Amex fails to offer any reason why *Randolph*'s "prohibitive costs / vindication of rights" doctrine should not apply to its agreements with plaintiffs. Accordingly, Amex's Petition should be denied.

## COUNTERSTATEMENT OF THE CASE

1. Pursuant to the policy of American Express, merchants with anticipated annual charge volume of less than $10 million (hereinafter, "small merchants")[2] who wish to accept Amex-branded payment cards must agree to be bound by a document entitled "Terms and Conditions for American Express® Card Acceptance" (the "Card Acceptance Agreement" or "CAA"). C.A. App. A45, A286. At some point in 1999, Amex began to employ a new form of CAA with its small merchant customers providing for arbitration of claims and prohibiting any aggregation of claims or collective or class-wide arbitration. *Id.* at A125, A136, A351. Amex did not purport to impose these restraints upon larger merchants. *Id.* at A44-45.

The May 2003 iteration of the CAA is typical, for present purposes, of the post-1999 CAAs, and is the one that the Second Circuit focused upon. The 2003 CAA contains a broad arbitration clause, under which either party has the option of choosing to arbitrate any "claim." If either the small merchant or Amex does elect arbitration, then the claim "shall be referred to the National Arbitration Forum (NAF), JAMS/Endispute (JAMS), or the American Arbitration Association (AAA), as selected by the party electing to use arbitration." *Id.* at A38.

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[2] The point of this nomenclature is not that all merchants with $10 million or less in charge volume are small; indeed, some are sizeable businesses as the Second Circuit pointed out. For the sake of shorthand, however, this brief will use the term "small merchants" to mean all merchants under this threshold and subjected to the standard-form CAA.

For claims that are referred to arbitration – *and only for such claims* – the small merchant is compelled to forego any form of class-wide action:

> IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT . . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.

*Id.* at A39 (capitalization in original); Pet. App. 10a-11a.

Within the arbitration, moreover, the small merchant is prohibited from joining its claims with those of any other merchant:

> There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card ("Service Establishments"), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other

> Service Establishment(s), unless otherwise agreed to in writing by all parties.

C.A. App. A39; Pet. App. 11a.

The Card Acceptance Agreement is provided to small merchants on a take it or leave it basis, "[e]ither at the time of enrollment or shortly thereafter." C.A. App. A44-45. The CAA is not itself executed by the small merchant; instead, the CAA provides that the merchant is deemed bound by the CAA by virtue of "accepting Cards for the purchase of goods and/or services." *Id.* at A32.

2. The instant action was commenced in 2003 by merchant plaintiffs challenging the policy under which Amex forces merchants, as a condition of being permitted to accept Amex's dominant corporate and personal charge cards, to accept Amex's fledgling revolving credit card products at grossly supracompetitive "merchant discount" rates – i.e., the fees that merchants pay to financial institutions in connection with payment transactions – in violation of Section 1 of the Sherman Act. The complaints allege that Amex commands substantial market power,[3] and that, by virtue of the coercive

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[3] Plaintiffs' relevant market definition comports squarely with the only case law addressing the issue pertinent here. In *In re Visa Check MasterMoney Antitrust Litig.*, No. 96-CV-5238, 2003 U.S. Dist. LEXIS 4965, at *10 (E.D.N.Y. Apr. 1, 2003), the court observed that the "evidence suggests" a relevant market consisting of standard consumer credit cards, to the exclusion of the charge cards that Amex targets to inelastic business customers and affluent individuals bent on accruing rewards. The extraordinary and documentable inelasticity of demand on the part of these user groups for Amex charge cards dictates a narrow market definition. The *United States v. Visa* case cited by Amex (Pet. 7 n.4) did not remotely address these issues.

tying arrangement, Amex is able to extract merchant fees for ordinary consumer revolving credit card transactions that greatly exceed competitive rates. *Id.* at A230-50. The complaints further allege that Amex's actions have had concrete anticompetitive effects in the tied product market for standard revolving credit card services, inducing rival payment card networks to switch production to less efficient, more expensive payment card products, depressing output in the tied product market, raising prices to merchants accepting payment card products, and costing U.S. merchants and their consumers many billions of dollars.

3. In April 2004, Amex moved to compel arbitration of the plaintiffs' claims. In opposing that motion, plaintiffs presented evidence that, even for a single plaintiff, the out-of-pocket cost of establishing liability and developing a damages theory in an antitrust case of this complexity, exclusive of attorneys' fees, would be likely to exceed $1 million, and, in any event, would certainly run into the many hundreds of thousands of dollars. Pet. App. 31a; C.A. App. A362-64, A298-99, A375-76. Defendants did not dispute this evidence. Pet. App. 30a n.11. Nor did Amex dispute the testimony of Dr. Gary L. French, an experienced antitrust economist, that expert witness fees limited to the issues of liability and the appropriate damages theory in this case would necessarily cost an individual claimant several hundred thousands of dollars, if not more. Pet. App. 31a; C.A. App. A362-64. Likewise undisputed was evidence that database management costs, in this document intensive litigation, would exceed several hundred thousand dollars. Pet. App. 35a n.13; C.A. App. A296-99. As plaintiffs advised the district court below, the defendants acknowledged in writing the

obvious truth that discovery and expert fees will, by necessity, "cost[] each of us many millions of dollars." C.A. App. A637, A638.

At the same time, plaintiffs submitted detailed evidence to the district court from their expert economist showing that, based on the theory of the Amended Complaint and the data available to plaintiffs as of May 2004, the average (i.e., median) small merchant plaintiff incurred $1,750.67 in actual damages during the four-year statutory period, or $5,252 in treble damages. *Id.* at A365, A367-68. This evidence was likewise undisputed and relied upon by the Second Circuit. Pet. App. 33a. Based upon all of this evidence, plaintiffs argued that they had made the showing required by *Randolph* that they would bear costs in arbitration that effectively preclude them from vindicating their federal statutory rights in the arbitral forum. *Randolph*, 531 U.S. at 90.[4]

4. In March 2006, the district court granted Amex's motion to compel arbitration. With respect to the plaintiffs' challenge under *Randolph*, the district court held that the enforceability of the collective action ban presented a question for an arbitrator to decide, and not the court. Pet. App. 67a. (Amex now concurs that this holding was error.

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[4] Plaintiffs also argued that: (i) enforcement of the collective action ban is unenforceable as to California merchants, under California unconscionability law and applicable choice of law principles, and (ii) the ban is not applicable, as a matter of New York contract law, to merchants whose contracts with Amex had no arbitration agreement, but to whom unilateral "change in terms" mailings containing the arbitration clause and collective action ban were allegedly sent in a 1999 mailer. The Second Circuit did not reach either of those arguments. Pet. App. 42a.

Pet. 8 n.5.) By way of dicta, however, the district court stated that it disagreed with plaintiffs' position, on the grounds that the costs imposed upon an individual claimant under the arbitration provision and collective action ban are all recoupable by a prevailing party.

5. On appeal, the Second Circuit reversed. The panel, comprised of Circuit Judges Pooler, Sack and Sotomayor, observed that "*Randolph* is controlling here to the extent that it holds that when 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'" Pet. App. 29a-30a. The court noted that, contrary to the district court's dictum, expert witness fees are simply not recoupable under the fee shifting provisions of the Clayton Act, whereas they are routinely recovered out of common fund class actions. Pet. App. 34a-35a. The court also observed that the obligation to advance hundreds of thousands (or more) dollars for fees and costs, which the arbitration agreement imposes on the individual claimant, clearly prevents the small merchant plaintiffs from vindicating their federal statutory rights in this case, irrespective of whether or not those fees and costs are ultimately recoupable by a prevailing party. *Id.* at 35a.

After reviewing all of the evidence in great detail under a *de novo* standard, the Second Circuit held that "the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver." *Id.* at 30a. Ruling that the collective action ban was thus unenforceable, the

Second Circuit then remanded to the district court to allow Amex an opportunity to elect whether it wished to proceed under the arbitration provision without the collective action ban, or to proceed in court. Pet. App. 42a-43a. Amex elected to proceed in court.

## REASONS FOR DENYING THE PETITION

### I.

### THE SECOND CIRCUIT'S APPLICATION OF *RANDOLPH* IS CONSISTENT WITH THE RULINGS OF EVERY OTHER CIRCUIT

This Court has recognized at least two bases upon which lower courts may invalidate an arbitration agreement consistent with the "liberal federal policy favoring arbitration agreements." *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The first ground is where "Congress intended to preclude arbitration of the statutory claims at issue." *See Randolph*, 531 U.S. at 91-92 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987)). The second ground is where the arbitration agreement would force the claimant to incur prohibitive costs that would preclude it from effectively vindicating its federal statutory rights. *See Randolph*, 531 U.S. at 90; *see generally, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). Plaintiffs' challenge to the collective action ban, and the Second Circuit's decision in this case, are based *solely* on the

second ground – the "prohibitive costs / vindication of rights" doctrine.

### *A. Amex's Arguments Based On Congressional Intent And* Gilmer *Are Superfluous And Irrelevant*

American Express's broad arguments regarding the Federal Arbitration Act and Congress's intent in enacting the Sherman Act have no bearing on this case. Plaintiffs have never argued that arbitration of their claims was precluded by federal statute, or that Congress intended to provide an inalienable right to class action treatment in antitrust cases. Nor did the Second Circuit in any way moor its decision in this Court's statutory preclusion precedents. Rather, the Second Circuit relied *solely* on the "prohibitive costs / vindication of rights" doctrine:

> We conclude that, on the record before us, the plaintiffs have adequately demonstrated that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs.

Pet. App. 6a; *see also id.* at 27a-28a, 29a-30a, 33a, 39a, 42a. The Second Circuit repeatedly emphasized that "we do not decide whether class action waiver provisions are either void or enforceable *per se*. Rather, we are concerned solely with the class action waiver contained in the contract between the parties

before us on this appeal." Pet. App. 6a; *see also id.* at 41a ("[W]e do not hold here that class action waivers in arbitration agreements are *per se* unenforceable. We also do not hold that they are unenforceable in the context of antitrust actions.") (emphasis in original) (footnote omitted). And indeed, Amex itself does not argue that the Second Circuit grounded its decision in anything other than the "prohibitive costs / vindication of rights" doctrine articulated in *Randolph*. Nonetheless, Amex's primary argument in the Petition is that class action waiver provisions in antitrust actions are not *statutorily* precluded. *See, e.g.*, Pet. 2 ("Nothing in either the FAA or the Sherman Act evidences any congressional intent to preclude agreements to arbitrate exclusively on an individual basis.").[5] This entire foray into congressional intent is a red herring.

Likewise gratuitous is Petitioners' discussion of *Gilmer*. Pet. 9-10, 12-14. In that case, there was no allegation whatsoever that the employee would be unable to vindicate his statutory rights in the absence of collective action. Indeed, *Gilmer* was not

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[5] This superfluous point is made repeatedly throughout the Petition. *See, e.g.*, Pet. 12 ("[N]othing in either [the FAA or Sherman Act] evinces any intention by Congress to preclude agreements to arbitrate on an individual basis."); *id.* at 14 ("[T]he Second Circuit should have concluded . . . that there was no statutory bar to enforcing a voluntary agreement to forgo classwide arbitration of Sherman Act claims."); *id.* at 16 ("Nor does the Sherman Act reflect any congressional intent to preclude agreements to arbitrate antitrust claims individually, even if they involve small damages."); *id.* at 17 ("Congress has never expressed any intent to preclude parties from agreeing to individual rather than class arbitration as to antitrust claims."); *id.* at 25 ("[T]he relevant statute-specific inquiry is whether Congress evinced intent to preclude class waivers under the Sherman Act.").

even filed as a class action at all. *See Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 (4th Cir. 1990). Nor did this Court address in *Gilmer* the question that it later confronted in *Randolph* – namely, whether an arbitration provision is enforceable where it would impose upon a party costs sufficient to prevent that party from vindicating its federal rights. Instead, the plaintiff in *Gilmer*, a brokerage manager, merely argued that arbitration was *facially* inconsistent with the Age Discrimination in Employment Act for numerous reasons, including "that arbitration procedures cannot adequately . . . provide for broad equitable relief and class actions," while the ADEA provides for class actions. *See Gilmer*, 500 U.S. at 32. The Court rejected Gilmer's arguments, noting that the applicable NYSE arbitration rules do, in fact, "provide for collective proceedings." *Id.* The Court also observed that, even if those rules did not allow for collective action, that fact would not necessarily preclude arbitration (e.g., it would not preclude arbitration in a case such as *Gilmer* itself, which was a non-class case). *Id.*

In the end, as the Second Circuit correctly noted, *Gilmer* simply does not apply here at all, because "[t]he plaintiffs do not proffer the argument rejected in *Gilmer*, namely that the class action waiver is unenforceable merely because the relevant statute allows class actions." Pet. App. 27a. Instead, the argument made by plaintiffs – and the basis of the Second Circuit ruling – is that the collective action ban is unenforceable under *Randolph* because it forces the individual plaintiff to incur costs which effectively prevent it from vindicating federal rights, and which it would not incur in litigation. Amex does not remotely argue that considerations of congressional intent, or the *Gilmer* decision,

undercut the "prohibitive costs / vindication of rights" doctrine, and it certainly does not ask this Court to renounce this aspect of *Randolph*, which has been uniformly adopted by the lower courts.

Accordingly, Petitioners' primary argument – that the Second Circuit failed to take account of *Gilmer* and the Court's statutory preclusion jurisprudence – is entirely misguided, and certainly does not invite review by this Court.

### *B. The Circuit Courts Of Appeal Are Uniform In Applying* Randolph *'s "Prohibitive Costs / Vindication Of Rights" Standard*

In *Randolph*, the Court recognized that "it may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." 531 U.S. at 90-91. The Court held, however, that the "record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter." *Id.* The Court then established a simple case-by-case framework for determining challenges to arbitration agreements based upon a "prohibitive costs / vindication of rights" rationale: "Where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92; *see also* Pet. App. 29a-30a.

1. Survey Of Circuit Case Law

Following *Randolph*, the Circuit Courts of Appeal have been uniform in following this case-by-case framework, and holding that an arbitration agreement may not be enforced against a claimant, if the claimant satisfies the burden of showing, in the particular case, that the arbitration agreement forces it to incur costs in the arbitral forum that will prevent it from vindicating its federal statutory rights. As the Eleventh Circuit observed in surveying the case law, there exists "overwhelming consensus among the Circuits" on this issue. *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259-60 (11th Cir. 2003). Indeed, the law of every Circuit is in accord on this point:

*First Circuit*: *Kristian v. Comcast Corp.*, 446 F.3d 25, 54-55 (1st Cir. 2006) (observing "[t]he class mechanism ban – 'particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements – forces the putative class member 'to assume financial burdens so prohibitive as to deter the bringing of claims,'" and holding that plaintiffs made the requisite showing of prohibitive costs to invalidate the class action ban under *Randolph*) (quoting Gilles, *supra*, Opting *Out of Liability*, 104 Mich. L. Rev. at 407).

*Second Circuit*: *In re American Express Merchants Litigation*, 554 F.3d 300, 315-16 (2d Cir. 2009) (Pet. App. 29a-30a) (quoting *Randolph*, 531 U.S. at 92) ("*Randolph* is controlling here to the extent that it holds that when 'a party seeks to

invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing likelihood of incurring such costs.'").

*Third Circuit*: *Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 216 (3d Cir. 2003) ("We are satisfied that the district court's analysis properly followed the 'case-by-case' teachings of *Green Tree* [*v. Randolph*] on how to decide if a cost-splitting provision in an arbitration agreement denies potential litigants the opportunity to vindicate their statutory rights."); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002) (claimant's burden is satisfied if it can "prove the likelihood of incurring prohibitive costs" under arbitration clause).

*Fourth Circuit*: *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir. 2007) ("[W]e have acknowledged that if a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002) (quoting *Randolph*, 531 U.S. at 92) ("[W]here a party 'seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.'"); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) ("[T]he appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, *i.e.* a case-by-case analysis that focuses, among other things, upon the

claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.").

*Fifth Circuit*: *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004) (noting this Court's decision in *Randolph* that "prohibitive arbitration costs may hamper an employee's ability to bring her statutory claims in arbitration, effectively preventing the employee from vindicating her statutory rights," but holding the issue moot in that case where the defendant agreed to shoulder all costs in arbitration); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 n.1 (5th Cir. 2002) (quoting *Randolph*, 531 U.S. at 91-92) ("'[A] party seeking to avoid arbitration on the ground that arbitration would be prohibitively expensive' bears the burden of the showing the likelihood of incurring prohibitive costs."); *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (quoting *Randolph*, 531 U.S. at 81) ("[T]he party resisting arbitration has the burden of showing the likelihood that 'arbitration would be prohibitively expensive.'").

*Sixth Circuit*: *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658 (6th Cir. 2003) ("If . . . the splitting or sharing of the costs of the arbitral forum under a particular arbitration agreement effectively prevents the vindication of a plaintiff's statutory rights, those rights cannot be subject to mandatory arbitration under that agreement."); *Burden v. Check into Cash, LLC*, 267 F.3d 483, 492 (6th Cir. 2001) (quoting *Randolph*, 531 U.S. at 81) ("As to the

potentially burdensome costs of arbitration, the party resisting arbitration has the burden of showing that likelihood that 'arbitration would be prohibitively expensive.'").

***Seventh Circuit***: *James v. McDonald's Corp.*, 417 F.3d 672, 679-80 (7th Cir. 2005) ("Ms. James has not provided any evidence concerning the comparative expense of litigating her claims. The cost differential between arbitration and litigation is evidence highly probative to Ms. James' claim that requiring her to proceed through arbitration, rather than through the courts, will effectively deny her legal recourse."); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) ("In the present case, the Livingstons have not offered any specific evidence of arbitration costs that they may have to face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs, even though the district court permitted discovery on that very question.").

***Eighth Circuit***: *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 n.9 (8th Cir. 2001) ("On remand, Gannon may renew her arguments concerning the fee-sharing provisions. If she does so, the District Court should consider her arguments in light of the Supreme Court's recent decision in [*Randolph*] (holding that 'a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs.').").

*Ninth Circuit*: While the Ninth Circuit has not had occasion to rule on the issues presented here, the districts courts within the circuit have applied *Randolph* consistent with the Second Circuit. *See, e.g., Greenwood v. Compucredit Corp.*, No. C 08-04878 CW, 2009 U.S. Dist. LEXIS 29979, at *19-*20 (N.D. Cal. Apr. 1, 2009) (quoting *Randolph*, 531 U.S. at 92) (observing that when "arbitration [is] challenged because the costs and fees would be prohibitive . . . the party seeking to avoid arbitration on such grounds 'bears the burden of showing the likelihood of incurring such costs.'. . . [But where] arbitration is directly challenged on the ground that [a statute] evinces an intention to preclude a waiver of judicial remedies," the case-by-case approach of *Randolph* is inapplicable); *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., Inc.*, 288 F. Supp. 2d 1033, 1038 (D. Ariz. 2003) (finding that, under *Randolph*, "plaintiffs have not met their burden of showing their likelihood of incurring prohibitively expensive arbitration costs[, which] depend on various factors to which no evidence specific to the plaintiffs has been submitted, e.g., the amount in controversy, the length of the arbitration hearing, the location of the arbitration hearing, etc.").

*Tenth Circuit*: *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (even prior to *Randolph*, invalidating an arbitration agreement, because its mandatory arbitration clause – with its attendant costs – "failed to provide an accessible forum in which [claimant] could resolve his statutory rights."). At the district court level, see *Owner-Operator Indep. Drivers Ass'n v. C.R. Eng., Inc.*, 325 F. Supp. 2d 1252, 1262 (D. Utah 2004) ("[T]he court finds that Plaintiffs have met their

burden and shown that in this case the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in an arbitral forum.").

*Eleventh Circuit*: *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (holding that "the enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances," and observing that where a class action waiver would prohibit the vindication of statutory rights, it is unenforceable under *Randolph*); *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259-60 (11th Cir. 2003) (following *Randolph*, and cataloguing "the overwhelming consensus among the Circuits" when applying *Randolph*'s "prohibitive costs / vindication of rights" doctrine).

*D.C. Circuit*: *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 708 (D.C. Cir. 2001) (upholding arbitration award because plaintiff made no showing under *Randolph* that the possibility of a large assessment of arbitration costs prevented her from attempting to vindicate her rights); *see also Toledano v. O'Connor*, 501 F. Supp. 2d 127, 150 (D.D.C. 2007) (under *Randolph*, a "Court's analysis of . . . the comparative cost of arbitrating and litigating [a dispute] is ultimately dispositive of plaintiffs' challenge to the arbitration provision.").

### 2. There Exists No "Circuit Split"

Amex attempts to manufacture a "circuit split" by arguing that some courts apply a statute-by-statute approach, while other courts employ a fact-specific, case-by-case analysis. Pet. 22-25. Amex's argument mixes apples and oranges. Plainly, challenges to an arbitration agreement under *Randolph*'s "prohibitive costs / vindication of rights" doctrine must *by necessity* proceed on a case-by-case basis, as the surveyed cases demonstrate. Conversely, any challenge under *Gilmer* and related case law contending that Congress somehow "intended to preclude arbitration of the statutory claims at issue" is by necessity a statute-by-statute inquiry. *Randolph*, 531 U.S. at 91-92 (citing *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 227). Indeed, many of the cases cited above – such as the Seventh Circuit's decision in *Livingston*, and the Fifth Circuit's decision in *Carter* (both relied upon by Amex, Pet. 24) – also contained *Gilmer*-type congressional intent challenges, and all of *those* challenges were necessarily resolved on a "statute-by-statute" basis. But that hardly undercuts the fact that challenges based on the "prohibitive costs / vindication of rights" rationale must proceed on a case-by-case basis. The courts of every Circuit are in full accord on this straightforward point, and Amex does not suggest otherwise.

It is no help to Amex's argument here that, in some of these cases (e.g., *Livingston* and *Primerica Life*) the plaintiff failed to make the requisite evidentiary showing of prohibitive costs. The fact is those courts recognize that the case-by-case framework of *Randolph* is appropriate for challenges

based on the "prohibitive costs / vindication of rights" doctrine. Nor is Amex's cause aided by *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), which preceded and failed to anticipate *Randolph*. In fact, the Third Circuit in *Johnson* specifically cited with disapproval the case-by-case standard applied in the Eleventh Circuit's decision in *Randolph*, which was then affirmed by this Court. 225 F.3d at 373-74. Since that time, the Third Circuit has squarely adopted a case-by-case approach designed to provide "potential litigants . . . [with] the opportunity to demonstrate that potential costs are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights." *Spinetti*, 324 F.3d at 217 (citing *Morrison*, 317 F.3d at 663).[6]

### *C. The Costs At Issue Are "Prohibitive"*

Plaintiffs clearly demonstrated below that the costs which the collective action ban forces each

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[6] *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), relied on by Amex here, did not remotely involve a *Randolph* "prohibitive costs / vindication of rights" challenge. Instead, the *Gay* court relied on *Johnson* and *Gilmer* to reject the argument that "Congress intended to preclude" arbitration of claims under the Pennsylvania Credit Services Act and the Credit Repair Organizations Act. *Id.* at 379-82. *Gay* also rejected an unconscionability challenge to the collective action ban in that case under Virginia law. *Id.* at 391-92. More relevant than *Gay* is the Third Circuit's recent decision in *Homa v. American Express Co.*, 558 F.3d 225, 233 (3d Cir. 2009), specifically holding that a collective action waiver in an arbitration agreement is unconscionable and unenforceable under New Jersey law to the extent that it concerns claims that are "of such a low value as effectively to preclude relief if decided individually."

individual plaintiff to incur are *prohibitive*; i.e., they effectively prevent the claimant from vindicating its statutory rights. *See supra* at 10, 11-12; Pet. App. 30a ("[T]he record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the class action waiver.") (footnote deleted). Amex's arguments now to the contrary are unavailing and untimely. Amex had every opportunity to challenge plaintiffs' factual showing below, and it did not, as the Second Circuit recognized. Pet. App. 30a n.11 ("The plaintiffs' estimated expert witness fees were essentially undisputed."). That should be the end of the inquiry.

In any event, Amex's argument that plaintiffs could vindicate their rights by pooling resources to hire a common expert, Pet. 20-21, is baseless. Amex's proposed fix presupposes an antitrust economist who will circuit-ride from individual arbitration to individual arbitration for some untold number of years, defending a single liability report based on responses to "common[] discovery requests" and information culled from multiple arbitral proceedings. Pet. 20. The notion is not only far-fetched and unsupported by any evidence,[7] but is plainly irreconcilable with the terms of the Card Acceptance Agreement, which provides: "The arbitration proceeding and all testimony, filings, documents and any information relating to or

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[7] Indeed, even if all eleven merchant plaintiffs were to advance for a litigation fund amounts equal to 100% of the damages they are seeking here, post-trebling, that would only total $57,750 – which is a small fraction of the undisputed amount of the *non-recoupable* costs alone in this case (to say nothing of the other costs and fees). Clearly, no rational actor would ever make such an investment.

presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Pet. App. 36a.[8]

Similarly misplaced is Amex's assertion that fees and costs are recoupable in an antitrust case. First, as the Second Circuit observed in support of its holding, expert fees are simply not recoupable in arbitration under the Clayton Act's fee shifting provisions, and plaintiffs proved by uncontested evidence that those fees – in and of themselves – were certain to far outstrip any possible recovery by any of the plaintiffs. Pet. App. 34a-35a (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987)). Second, even for costs and fees that are recoupable, such as attorneys fees, it is simply irrational to expect any litigant to advance millions of dollars – or even hundreds of thousands – for a chance to win $5,250 post trebling. Pet. App. 35a; *accord Dale*, 498 F.3d at 1224; *Kristian*, 446 F.3d at 58; *Cooper v. MRM Investment Co.*, 367 F.3d 493, 513 n.8 (6th Cir. 2004) ("Under our decision in *Morrison* [*supra*], the relevant costs are Cooper's out-of-pocket costs, without reference to the possibility that she may later recoup some of them.").

Accordingly, Amex fails to provide any serious basis for challenging the factual determination that

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[8] Nor is there any merit to the suggestion that plaintiffs' factual showing of the costs they would incur in arbitration was speculative. Plaintiffs' expert was able to affirm that expert fees alone would total "with certainty" at least several hundred thousand dollars, and quite possibly over a million. Pet. App. 31a. Plaintiffs' counsel offered similar testimony regarding other costs, such as database management. *Id.* at 35a n.13. Amex never made any challenge to these unequivocal evidentiary showings, which the Circuit Court was well within its discretion to credit.

plaintiffs in this case would be forced to incur in a one-on-one arbitration costs that are "prohibitive."

### *D. The Costs At Issue Are Not "Costs That A Plaintiff Would Incur In Either Arbitration Or Litigation"*

A separate question is whether the prohibitive costs imposed upon the individual claimant under the collective action ban are, as Amex claims, "costs that a plaintiff would incur in either arbitration or litigation." *See* Pet. i, Question Presented #2. As shown below, Amex is incorrect in claiming that these undisputed costs would be "equally applicable to a lawsuit in court." Pet. 27.

At the outset, there is simply no merit to the suggestion that the "prohibitive costs / vindication of rights" doctrine applies only to neutrals' fees, or arbitration forum fees, or any other specific line item of expense. As the Fourth Circuit recognized in *Bradford*, the nature of the costs imposed on the individual claimant by the challenged clause are immaterial – i.e., it makes no difference if the "prohibitive costs" consist of neutrals' fees, filing fees, or, as here, all of the expert costs and other disbursements that the individual claimant is forced to bear as a result of the ban on collective action: "[T]he proper inquiry under *Gilmer* is not where the money goes but rather the amount of money that

ultimately will be paid by the claimant."[9] 238 F.3d at 556. Likewise, in *Morrison*, the Sixth Circuit sitting *en banc* held "the issue is *not* 'the fact that [the] fees would be paid to the arbitrator,' *Bradford*, 238 F.3d at 556, but rather whether the '*overall cost of arbitration*,' *id.*, from the perspective of the potential litigant, is greater than 'the cost of litigation in court,' *id.*" 317 F.3d at 664 (emphasis added) (brackets in original); *see also Kristian*, 446 F.3d at 54 (counting expert witness fees and all other costs imposed on an individual claimant by the collective action ban); *Dale*, 498 F.3d at 1220 (same). Indeed, no court following *Randolph* has ever held to the contrary; much less did the Second Circuit "depart[] from its sister circuits" as to this issue. Pet. 27.

As a matter of logic, moreover, the focus *must* be on the "overall cost of arbitration," as opposed to a narrow subset, consisting of only filing fees and neutrals' fees. A hypothetical proves this point: Suppose an arbitration agreement were to provide that a claimant must post a $1 million bond to bring a federal claim in arbitration, and that this onerous condition totally precludes vindication of a plaintiff's federal claims. No one would argue that this clause is perfectly enforceable under *Randolph* just because it does not concern costs – like neutrals' fees and

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[9] In *Bradford*, which was decided only two weeks after *Randolph*, the Fourth Circuit relied in the first instance upon *Gilmer* for the proposition that an arbitration agreement may be enforced only so long as it allows for effective vindication of federal statutory rights. The court observed that *Randolph* reaffirmed its view that a "case-by-case analysis" based on a "showing of individualized prohibitive expense" would be necessary "to invalidate an arbitration agreement" under the "effective vindication of rights" rationale. 238 F.3d at 557.

entrance fees – that are endemic to arbitration. It follows *a fortiori* that the focus under *Randolph* can only be on *all costs* that will be incurred in arbitration under a particular arbitration clause. Plainly, the proper question is whether the arbitration clause at issue forces the claimant to incur prohibitive costs – ***of whatever type or nature*** – in "the arbitral forum that a litigant would not incur if he filed in court". Pet. 18.

Here, it is simply beyond question that the collective action ban forces each individual plaintiff to incur costs in the arbitral forum that it would not incur if it were to proceed in court. As shown above at 6-8, the Amex arbitration agreement forces the individual claimant to shoulder all the expenses of proceeding against Amex *only* "IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM." Pet. 5 (capital letters in original). If arbitration is not chosen, there is no ban on collective action at all. Thus, under the agreement, a party is free to file an action in court, and if the other party does not choose arbitration with respect to a given claim, then that claim may proceed on a class action basis or group basis in the courts of law. *See supra* at 4-5. In any such multi-plaintiff action, all of the costs of the action may then be shared among the plaintiffs. In a class action like the instant case, expenses will be ultimately borne ratably by several million claimants out of a common recovery. *See* Gilles, *supra*, *Opting Out of Liability*, 104 Mich. L. Rev. at 407 ("In the absence of the waiver, the claimant may spread these costs across thousands of coventurers (or have them advanced by lawyers, as happens in practice). In the presence of the waiver, these costs fall on her alone. And these costs, in a complex commercial case, will exceed the value of the

recovery she is seeking."); *see also Kristian*, 446 F.3d at 54-55.

Amex contends that "[i]n the courts below, plaintiffs did not contend[,] much less introduce any evidence" that the collective action ban is "specific" to arbitration proceedings. Pet. 19. This is just not true. Plaintiffs' opening brief to the Second Circuit (available on Westlaw) provides: "For claims that are referred to arbitration – ***and only for such claims*** – the small merchant is compelled to forego any form of class-wide action." Brief at 12 (emphasis added). And the "evidence" that Amex complains is lacking on the instant record is the pellucid language of the arbitration clause itself. There is simply no room for ambiguity here.[10]

Finally, Amex never even argued in the courts below that only costs "*unique* to arbitration" should count in assessing prohibitive costs under *Randolph*. Accordingly, this argument should not be considered for the first time here, on this Petition. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) ("'Ordinarily, this Court does not decide questions not raised or resolved in the lower courts.' *Youakim v. Miller*, 425 U.S. 231, 234 (1976). These principles

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[10] We do not understand Amex to argue that the Second Circuit somehow had a contrary reading of the agreement – i.e., one under which the collective action ban might apply equally to court and arbitral proceedings. Pet. 27. But even if the contract did read that way, it would make little difference, as the Second Circuit made clear that such a provision would confer an impermissible "partial immunity from civil liability for future violations of the antitrust laws." Pet. App. 38a (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)) (citations and internal quotation marks omitted); *see also Mitsubishi*, 473 U.S. at 637 n.19.

help to maintain the integrity of the process of certiorari.").

## II.

## PRUDENTIAL CONCERNS MILITATE AGAINST GRANTING CERTIORARI

In addition to the foregoing reasons, certiorari would be improvident here because the full Court would not be available to hear the case. Judge Sotomayor was on the panel below, and would presumably have to recuse herself from consideration of this matter here. Thus, even if Amex's Petition did raise issues worthy of the Court's attention – and it does not – those issues should await a case that allows for consideration by a full Court.[11]

Nor is review warranted on the argument that the Second Circuit's ruling "vitiates the bargain struck by parties who chose individual arbitration." Pet. 29. The same can be said, equally, for every decision applying *Randolph* to invalidate an arbitration agreement. Moreover, as discussed above at 6-8, the dispute resolution provisions of the Card Acceptance Agreement do not represent a "bargain

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[11] Moreover, the recent grant of certiorari in *Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, No. 08-081198, in no way militates in favor of granting certiorari in this case. *Stolt-Nielsen* does not remotely involve the issue of whether class treatment might be necessary to vindicate a claimant's rights under the federal antitrust laws. *See Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 102 n.17 (2d Cir. 2008). Neither the petitioners nor respondents in that case even mentioned in their briefs any of the legal issues as to which Amex seeks review in this case. Nor would a ruling either way on the question presented in *Stolt-Nielsen* have any bearing on the outcome of this case.

struck by the parties." Rather, they are boilerplate terms in standard form adhesion contracts, most of which were unilaterally added years after the agreement was originally entered into, via a change-in-terms mass mailing.

Likewise unpersuasive here is the warning that, under the Second Circuit's decision, future courts will get bogged down in a "fact-dependent battle of litigation cost experts." Pet. 31. As shown above at 16-24, courts routinely make case-by-case factual determinations under *Randolph*, and there is no evidence that the lower courts are being particularly burdened by making these assessments. Nor, conversely, is review warranted by Amex's admonition that it is "difficult to think of a case in which an individual [purchaser] will have suffered damages high enough to be able to bring an individual [antitrust] suit under the Second Circuit's sweeping test." Pet. 31. Amex misses the point: it *should* be difficult to imagine a case where a plaintiff who can prove that he is unable to vindicate his rights in an individual arbitration may be forced to proceed via an individual arbitration.

Also unavailing is the argument that the Department of Justice and the Federal Trade Commission have powers to enforce antitrust laws. *See* American Bankers Assoc. Amicus Br. at 14-16; Verizon Comms. Inc. Amicus Br. at 18. The issue in the instant damages action is whether the merchant plaintiffs can vindicate their rights under the antitrust laws. No FTC or DOJ action can serve the

compensatory interests of these plaintiffs.[12] Moreover, so far as the deterrent aims of the antitrust laws are concerned, this Court and Congress have consistently recognized that private antitrust actions – and particularly class actions – play an indispensable role. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); Pet. App. 37a.

## CONCLUSION

Amex's Petition for a Writ of Certiorari should be denied.

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[12] By the same token, the DOJ's enforcement action in *United States v. Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2003), in no way obviated the need for Amex to vindicate its own compensatory interests in *American Express Travel Related Services Co. v. Visa U.S.A.*, No. 04 Civ. 8967 (BSJ) (S.D.N.Y.), which was based on all of the same facts as the DOJ action.

Respectfully submitted,

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# REPLY BRIEF

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No. 08-1473

IN THE
# Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
*Petitioners*,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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August 5, 2009

## CORPORATE DISCLOSURE STATEMENT

Petitioners' Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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Petition for a Writ of Certiorari, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198 (U.S. filed Mar. 26, 2009) ..... 11

Respondents contend that the decision below merely applied settled Supreme Court precedent in a manner consistent with the law of other circuits. Nothing could be further from reality. The decision below broke from fundamental FAA principles and embraced a new form of judicial interference with commercial arbitration agreements based on a flawed and expansive reading of *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000). The Second Circuit's decision raises important issues of federal arbitration law on which the lower courts are in conflict, and thus warrants this Court's review.

## I. THIS COURT SHOULD REVIEW THE IMPORTANT QUESTIONS OF FEDERAL ARBITRATION LAW RAISED BY THE SECOND CIRCUIT'S DECISION

This Court's longstanding precedents in cases like *Gilmer* and *Mitsubishi* have consistently held that arbitration agreements must be enforced "in accordance with the terms of the agreement," 9 U.S.C. § 4, unless *Congress itself* has evinced an intention to prohibit them. *See* Pet. 12-13. Curtailing *judge-made* limitations on parties' freedom to enter into commercial arbitration agreements is central to the FAA's core purpose – namely, to "reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer*, 500 U.S. at 24. As the petition demonstrates (at 12-18), neither the FAA nor the Sherman Act – the underlying federal statute in this case – evinces any congressional intent to preclude parties from agreeing exclusively to individual arbitration. Under *Gilmer* and *Mitsubishi*, therefore, the parties' arbitration agreement should have been enforced in full.

Respondents now concede (at 13) that they "have never argued" that the parties' provision requiring individual (but not class) arbitration is "precluded by federal statute" or otherwise inconsistent with Congress's intent. Opp. 13-14 (arguing that "congressional intent is a red herring," "[i]rrelevant," and "[s]uperfluous"). Respondents instead argue (at 12) that *Randolph* created a "second ground" to invalidate such provisions – namely, that, without the class mechanism, an individual plaintiff's small damages might cause it not to bother pursuing its claim. Respondents assert (*id.*) that this is settled law, but it is not, as even the Second Circuit conceded. *See* Pet. App. 28a. The Second Circuit's decision accordingly raises important questions that this Court should grant certiorari to resolve.

First, the Second Circuit's decision lacks support in *Randolph* itself. As a majority of circuits have recognized (*see infra* pp. 8-10), *Randolph* only addressed the possibility that "large *arbitration* costs" such as the "filing fee," "arbitrator's fee," and "administrative fees" would preclude the claimant's access to the arbitral forum. 531 U.S. at 90 & n.6 (emphasis added); *accord id.* at 93 (dissenting op.) (agreeing that the question is "who pays *for the arbitral forum*") (emphasis added). The Second Circuit, however, extended *Randolph* to permit courts to invalidate *any* provision of an arbitration agreement based on an open-ended, free-flowing analysis of all the potential costs and benefits of arbitration pursuant to the agreement versus litigation. The Second Circuit struck down the individual arbitration provision not because arbitration would cost more than litigation, but because antitrust claims are inherently expensive to pursue in any forum. Only the prospect of the

pot of gold at the end of a class proceeding (whether in arbitration or litigation) would, the court assumed, lead the litigant's lawyers to pursue such a claim. Because an individual arbitration would be limited to each claimant's own damages (albeit potentially trebled and with attorneys' fees), the Second Circuit concluded that respondents would have insufficient incentive to vindicate their statutory rights. Notwithstanding respondents' bald assertion (at 3) that *Randolph* endorsed this sort of inquiry, that is not what *Randolph* said.

Moreover, the Second Circuit's extension of *Randolph* to invalidate a provision requiring individual arbitration is incompatible with this Court's holding that, because "[a]rbitration under the [FAA] is a matter of consent," *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989), the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 20. The Second Circuit focused one-sidedly on the fact that individual arbitration does not enable multiple plaintiffs to share costs, but it gave no weight to the fact that class arbitration is a completely "different sort of arbitration" – entailing fundamentally different procedures and risks – than what the parties agreed to. *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995).

Class arbitration necessitates complex procedures that undermine the "simplicity, informality, and expedition" that the parties bargained for in agreeing to arbitration. *Mitsubishi*, 473 U.S. at 628. Moreover, parties that agreed to the informality and limited judicial review associated with arbitration in an individual dispute might well not be willing to do so when the stakes are magnified many-fold. *Randolph*

did not authorize courts to rewrite parties' agreements in such a critical way. Indeed, Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy – three of the five-member majority in *Randolph* – would have held in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), that the FAA precludes state and federal courts from imposing class procedures in contravention of the parties' agreement, *id.* at 459-60 (dissenting op.) (noting that a party might not agree to class arbitration "to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator"). Here, likewise, the parties' agreement expressly and deliberately *precludes* class arbitration.

The Second Circuit's broad reading of *Randolph* also conflicts with *Gilmer*, *Mitsubishi*, and their progeny. The evidence is undisputed that Congress did not view class proceedings as necessary to vindicate the Sherman Act. As explained in the petition, Congress declined to incorporate a class action device to ensure that every private damages claim would be brought, and instead provided for other enforcement mechanisms to vindicate federal policies. *See* Pet. 17; Verizon Communications *et al.* Amicus Br. 17-19. The Second Circuit's substitution of its own judge-made policy for Congress's violates the FAA's central tenet that arbitration agreements must be enforced by their terms unless Congress, not the courts, says otherwise.

The Second Circuit's novel and expansive interpretation of *Randolph* will indisputably have enormous real-world commercial implications, warranting this Court's review. As the petition demonstrates (at 30-32), the Second Circuit's decision will lead to sweeping judicial invalidation of commercial arbitration

provisions that call for individual but not class arbitration. Except for all but the largest of claims, such provisions will likely be held unenforceable. That will, in turn, effectively abrogate many arbitration agreements in their entirety, because many parties that agreed to individual arbitration would not have agreed to class arbitration. *See Bazzle*, 539 U.S. at 459-60 (dissenting op.). The Second Circuit's decision thus strikes at the heart of the FAA's pro-arbitration policy. Respondents do not dispute these consequences; they welcome them. *See* Opp. 32. But, given the significant doubt about the correctness of the Second Circuit's decision, surely this Court's review is warranted before such a dramatic new form of judicial intrusion into commercial arbitration agreements is permitted to occur.

## II. CERTIORARI IS WARRANTED TO RESOLVE CONFLICTS AMONG THE CIRCUIT COURTS

Respondents assert that "the Circuits are uniform thus far in their treatment of collective action bans under *Randolph*," Opp. 3, and that there is an "overwhelming consensus" on the proper scope of *Randolph*'s "arbitration costs" inquiry, Opp. 17. Not so. Notwithstanding respondents' efforts to blur the lines, the circuits are deeply divided on both issues, and the Second Circuit's decision is in conflict with not one but two lines of case law in other circuits.

### A. The Circuits Are Divided on Whether *Randolph* or *Gilmer* Applies to Provisions Requiring Individual Arbitration

As explained in the petition, the Second Circuit and the First Circuit are in conflict with the Third, Fifth, Seventh, and Eleventh Circuits as to whether *Randolph*'s "arbitration costs" inquiry or *Gilmer*'s

congressional preclusion standard provides the proper framework for analysis of provisions requiring exclusively individual arbitration. The decision below and the First Circuit in *Kristian* relied on *Randolph* to invalidate provisions prohibiting class arbitration, despite the absence of any congressional intent to preclude such provisions. *See* Pet. 9-10, 24-25.

In contrast, the Third, Fifth, Seventh, and Eleventh Circuits have followed *Gilmer*'s congressional preclusion test in upholding class arbitration prohibitions. The Fifth and Seventh Circuits in *Carter* and *Livingston*, respectively, upheld class arbitration prohibitions under *Gilmer*, and they limited their "arbitration costs" inquiry under *Randolph* to filing fees and other arbitration-specific costs. *See Carter*, 362 F.3d at 298, 300; *Livingston*, 339 F.3d at 557. Likewise, the Eleventh Circuit, on remand from *Randolph*, correctly interpreted this Court's decision as "reinforc[ing]" the mandate to respect parties' agreements, not as a broad new license to rewrite them. *Randolph II*, 244 F.3d at 816-19 (finding class arbitration prohibition enforceable under *Gilmer*). And the Third Circuit in *Gay*, adhering to its prior decision in *Johnson*, expressly rejected a *Randolph*-type "arbitration costs" rationale as a basis to invalidate a class arbitration prohibition under the FAA.[1]

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[1] Respondents' description of *Gay* (Opp. 24 n.6) omits one of its key conclusions: although a class arbitration prohibition would be held unconscionable under Pennsylvania law because of the supposedly prohibitive "costs associate[d] with individual versus class-based litigation," state law was preempted by the FAA, which "*requires* piecemeal resolution when necessary to give effect to the arbitration agreement." 511 F.3d at 393-95 (alteration in original).

Each of these decisions remains the law of its respective circuit[2] and is in conflict with the decision below.

Respondents' contention that American Express is "mix[ing] apples and oranges" (Opp. 23) misconstrues American Express's argument. American Express does not deny that *Randolph*, to the extent it applies, has been held to involve a "case-by-case" inquiry. Rather, American Express contends that *Randolph* does not apply at all to the question whether a requirement of individual arbitration is enforceable, and only applies to the distinct question whether the threshold costs *of the arbitral forum itself* are prohibitive.

Contrary to respondents' assertion, the circuits are in conflict as to whether a case-by-case "arbitration costs" inquiry under *Randolph* applies to provisions requiring individual arbitration, or whether *Gilmer*'s statute-specific congressional preclusion test provides the sole ground for invalidating such provisions. Two circuits have applied *Randolph*; four circuits have applied *Gilmer*.[3] The Court should resolve that conflict.

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[2] None of respondents' other decisions from those circuits (Opp. 18-24) addressed the enforceability of a class arbitration prohibition under the FAA. Most involved challenges to cost-splitting provisions, not class arbitration restrictions. *See infra* note 5. The remaining cases – *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007), *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002), and *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009) – are inapposite because they addressed solely state unconscionability law.

[3] The Fourth Circuit's position is unclear. Recent *dicta* appear in line with the First and Second Circuits, *see* Pet. 24 n.15 (citing *Cotton Yarn Antitrust Litig.*, 505 F.3d at 285), but earlier precedent followed *Johnson* and *Randolph II*, *see Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (Wilkinson, J.).

### B. The Circuits Are Also Split on Whether *Randolph*'s "Arbitration Costs" Inquiry Extends to Costs Not Unique to Arbitration

The decision below is also in conflict with other circuits as to whether *Randolph* properly extends beyond costs that are unique to arbitration – such as filing fees, arbitrator's fees, and administrative fees that a party would never incur in court. Because *Randolph* only addressed these types of costs, most circuits (like the district court below[4]) have applied *Randolph*'s case-by-case inquiry only to claims that arbitration-specific costs would be prohibitive. Respondents' brief demonstrates this: except for the Second Circuit (decision below), the First Circuit (*Kristian*), and arguably the Fourth Circuit (*see supra* note 3), all of the other circuits catalogued by respondents (Opp. 17-24) – the Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits – have applied *Randolph*'s "arbitration costs" rationale only to "cost-splitting," "fee-sharing," and similar requirements that the plaintiff pay a part (usually half) of such arbitration-specific fees.[5] *See also* Pet. 26 n.16 (citing additional cases).

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[4] Respondents are wrong in asserting that this issue was never "raised or resolved in the lower courts." Opp. 30. The district court held that respondents had "misconstrue[d] the nature of the judicial inquiry" under *Randolph* and failed to show that they would be responsible for "*costs which would not be incurred in a judicial forum*." Pet. App. 55a.

[5] *See Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 215-17 (3d Cir. 2003); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604-10 (3d Cir. 2002); *Carter*, 362 F.3d at 300-01; *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711-12 (5th Cir. 2002); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 657-58 (6th Cir. 2003) (en banc); *James v. McDonald's Corp.*, 417 F.3d 672, 678-79 (7th Cir. 2005); *Livingston*, 339 F.3d at 557; *Gannon v. Cir-*

The Second Circuit, in contrast, expanded *Randolph* to include all costs – not just the threshold "price of admission" to the arbitral forum that would not be required to sue in court. According to respondents, *Randolph* licenses a new, judge-made arbitrability test – namely, to predict whether the differential between "***all of the costs*** that a plaintiff stands to incur under a specific arbitration clause against ***all of the costs*** that the plaintiff would have incurred in litigation" will deter a particular plaintiff from filing a claim. Opp. 3-4.[6] This burdensome and unworkable new precondition to the enforcement of arbitration agreements goes far beyond what *Randolph* or other circuits have sanctioned. Contrary to respondents' effort to lump all these cases together, the Second Circuit's extension of *Randolph*'s "arbitration costs" analysis to class arbitration prohibitions marks a fundamental departure from the law of its sister circuits.[7]

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*cuit City Stores, Inc.*, 262 F.3d 677, 683 n.9 (8th Cir. 2001); *Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1257 (11th Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 705 (D.C. Cir. 2001); *accord Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 552 (4th Cir. 2001). Of the three remaining cases, *Dale* and *Primerica Life* addressed state unconscionability claims, *see supra* note 2, and *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 492 (6th Cir. 2001), addressed *Randolph* only in *dicta* and did not make clear what type of costs were being addressed.

[6] Even this proposed "test" would not in fact resolve this case, because there is no suggestion or evidence below that all the costs of arbitration would in fact exceed those of litigation. *See* Pet. App. 55a.

[7] Respondents' analogy between individual arbitration and a $1 million bond requirement (Opp. 28) is wholly inapt. Individual arbitration does not impose any special costs on claimants;

As the volume of decisions indicates, there is widespread conflict among the circuits as to the meaning and application of *Randolph* and the enforceability of agreements that provide for only individual arbitration. The Court should grant certiorari to resolve those conflicts.[8]

## III. THIS COURT'S GRANT OF CERTIORARI IN *STOLT-NIELSEN* SUPPORTS GRANTING CERTIORARI HERE

This Court's grant of certiorari in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, No. 08-1198 (cert. granted June 15, 2009), confirms the importance of the issues presented here. The Court granted certiorari in *Stolt-Nielsen* to decide whether the federal substantive law of arbitrability permits courts to read class procedures into parties' arbitration agreements without their consent. The Court recognized that American businesses and other commercial parties have a strong interest in clear rules regarding the enforceability of individual arbitration agreements. The same considerations militate even more strongly in favor of granting certiorari in this case: while *Stolt-Nielsen* involves the relatively rare (and avoidable) situation where the parties' agreement is

---

indeed, individual arbitration costs will almost certainly be lower than class action litigation costs. Class procedures, of course, allow plaintiffs to share costs and pool benefits, but they also create a fundamentally "different sort of arbitration" that cannot be imposed on parties without their consent. *Champ*, 55 F.3d at 275.

[8] Respondents' contention (at 31) that it would be "improvident" for the Court to grant certiorari because Judge Sotomayor was on the panel below is inconsistent with the established practice of this Court. *See, e.g., Beard v. Banks*, 548 U.S. 521 (2006) (Alito, J., recused); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (Roberts, C.J., recused).

"silent" on the availability of class procedures, this case deals with the more common circumstance where the parties clearly and unequivocally agreed that their arbitration would proceed solely on an individual basis.

If the Court is not inclined to grant certiorari in this case, it should, in the alternative, hold the case for *Stolt-Nielsen*. The issues in the two cases are clearly similar. *See* Eugene Gressman et al., *Supreme Court Practice* 276, 339 (9th ed. 2007) (Court may hold for a pending case that raises "similar" issues). If the Court reverses in *Stolt-Nielsen*, it will presumably vindicate the principle that class arbitration procedures may not be imposed on non-consenting parties under the FAA. It will also likely recognize that class arbitration is a wholly different type of procedure that fundamentally rewrites the parties' bargain. *See Stolt-Nielsen* Pet. 17-22. Given that the decision below disregarded these considerations, and instead gave weight only to plaintiffs' interest in the cost-spreading effect of class arbitration, a reversal in *Stolt-Nielsen* would create a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (standard for GVR); *see also id.* at 191-92 (Scalia, J., dissenting) (GVR is appropriate where "an intervening factor has arisen that has a legal bearing upon the decision [below]"). Holding the petition would ensure that the Second Circuit's doubtful resolution of the important issues presented receives further appellate consideration in light of *Stolt-Nielsen*, and preserves the opportunity, if necessary, for future review of those issues by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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No. 08-1473

# In The Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

*Petitioners,*

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,

*Respondents.*

**On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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*Amici Curiae* American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Consumer Bankers Association ("CBA") and California Bankers Association ("CABA") (together, "*Amici*") respectfully submit this brief in support of the Petition for a Writ of *Certiorari* filed by Petitioners American Express Company and American Express Travel Related Services Company, Inc. (together, "AMEX").

## *AMICI'S* INTEREST IN THIS CASE[1]

Many of *Amici's* members, constituent organizations and affiliates (collectively, "Members") have independently adopted as standard features of their business and consumer contracts provisions that in appropriate circumstances mandate the individual arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive and effective method of resolving disputes and because arbitration minimizes the disruption and loss of good will that often results from litigation.

[1] All counsel of record received timely notice of *Amici's* intent to file this brief under Supreme Court Rule 37 and provided blanket consent to the filing. No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici* and their members made a monetary contribution intended to fund the preparation or submission of the brief.

The ABA is the principal national trade association of the banking industry in the United States. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional and money center banks. The ABA also represents savings associations, trust companies and savings banks. ABA members hold an overwhelming majority – approximately 95% – of the domestic assets of the U.S. banking industry. The ABA frequently appears in litigation, either as a party or *amicus curiae*, in order to protect and promote the interests of the banking industry and its members.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices. AFSA has provided services to its members for more than 90 years. The association's officers, board, and staff are dedicated to continuing this legacy of commitment through the addition of new members and programs, and increasing the quality of existing services.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home

equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally-insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

The CABA is a non-profit trade association established in 1891. The CABA represents most depository institutions that operate in the State of California.

Unless it is reversed, the decision of the Panel below will adversely impact most arbitration agreements, which require individual arbitration and disallow class proceedings in arbitration. A finding that Amex' arbitration agreement is invalid due to its individual arbitration requirement would seriously undercut the value of arbitration to Members who use such agreements. The reality and threat of class action proceedings would predictably raise the cost of providing goods and services to their customers. Accordingly, *Amici* have a compelling interest in the issues at stake in this case and in this Court granting *certiorari* and reversing the Panel's erroneous decision.

## SUMMARY OF ARGUMENT

*Certiorari* is warranted in this case because the Panel decision below fundamentally misapplied this Court's teachings under the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1, *et seq.*, and created a split with decisions of other Circuits bearing on the enforceability of provisions requiring individual arbitration and the construction of arbitration agreements. Specifically, this Court should review the decision below because:

- In conflict with the FAA, this Court's precedents, and the decisions of other Circuits, the Panel elevated class action procedures – applied in an arbitration context for which they were never intended – over the federal policy in favor of arbitration. It insisted upon class proceedings even though Congress crafted strong government enforcement mechanisms and consciously *declined* to provide for class enforcement of the antitrust laws.

- In disregard of *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), the Panel treated costs that would arise either in *litigation* or arbitration as justifying invalidation of the arbitration agreement's individual arbitration requirement and then made an unwarranted and premature *assumption* that the arbitrator would apply a confidentiality provision in the parties'

arbitration agreements in a manner that would impede the ability of merchants to share expert witness fees.

- The Panel refused to apply the arbitration agreement as written and instead adopted a mode of contract analysis wholly at odds with the approach applied to non-arbitration agreements.

In all of these respects, the Panel adopted a hostile approach to arbitration requiring correction by this Court.

## ARGUMENT

### I. The Panel Improperly Substituted Its Policy Preferences For Congress' Judgment.

#### A. The FAA Establishes A Strong Federal Policy Favoring Arbitration.

The law recognizes a strong interest in the enforceability of contracts in accordance with their terms. *See Sander v. Alexander Richardson Investments*, 334 F.3d 712, 721 (8th Cir. 2003) ("Public policy demands enforcing contracts as written and recognizing the parties' freedom to contract."). Prior to the adoption of the FAA, this public policy was circumvented with respect to arbitration agreements by state and federal courts alike, which refused to enforce such agreements. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009).

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements. . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288 (2002) (quoting *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983). Accordingly, Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). It "command[s] that an arbitration agreement is enforceable just as any other contract. . . ." *Vaden*, 129 S. Ct. at 1275.

"The advantages of arbitration are many: It is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility, and is less disruptive of ongoing . . . dealings among the parties." H.R. Rep. No. 97-542, at 3 (1982). These "advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted). Below, the Panel acknowledged that "an individual arbitration brought by a plaintiff will likely cost less than a trial in federal district court. . . ." App. to Pet. Cert. ("App.") 36a n.14.

The benefits of arbitration are not limited to parties who have disputes. Rather, *all* contracting parties benefit from the lower dispute resolution costs inherent in arbitration. This is because economic considerations force providers to pass on to their users, in whole or in part, the lower dispute resolution costs they incur as a result of arbitration. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements,* 2001 J. Disp. Resol. 89, 91-93. Indeed, economic theory teaches that user costs will fall with producer costs even if the producer has a monopoly. Hal R. Varian, Intermediate Microeconomics 424-29 (7th ed. 2006) (setting forth monopolist's profit maximization formula under which decreases in marginal costs result in lower prices).

Moreover, published studies show significant additional benefits to arbitration, as well as high levels of satisfaction for parties who participate in arbitration. *See, e.g.,* Harris Interactive, *Arbitration: Simpler, Cheaper and Faster Than Litigation*, http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (Apr. 2005) (strong satisfaction with arbitration results and process, including speed and simplicity); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 3, http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf (Dec. 2004) ("consumers find the arbitration process beneficial to resolving disputes"); Lewis L. Maltby, *Private Justice: Employment*

*Arbitration and Civil Rights,* 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998) (director of ACLU's National Task Force on Civil Liberties in the Workplace concludes that employees collectively receive *10.4%* of their demand in litigation, compared with *18%* in arbitration, and "arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history").

### B. Imposition Of Class Procedures Fundamentally Alters The Parties' Arbitration Agreement.

As Amex has explained, when Congress enacted today's antitrust laws *prior* to the adoption of Rule 23, it provided strong government enforcement mechanisms in lieu of class actions. *See* Pet. Cert. 16-18. The existence of substantial problems with class actions cannot be disputed. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 401 (RAND Institute for Civil Justice 2000) (leaving open the "great big question" whether class actions, on balance, serve the public well); *Mirfashi v. Fleet Mortgage Corp.,* 356 F.3d 781, 785 (7th Cir. 2004) (rejecting settlement giving class counsel a "generous fee" because the settlement "sold . . . 1.4 million claimants down the river"); *In re Gen. Motors Corp.*, 55 F.3d 768, 778 (3d Cir. 1995) (noting that class actions can become a vehicle for collusive settlements); 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner, sponsor of Class Action Fairness Act) ("The class action judicial

system has become a joke, and no one is laughing except the trial lawyers . . . all the way to the bank."). Certainly, sophisticated Amex merchants could well prefer cost savings and other arbitration benefits to the speculative prospect of "relatively paltry potential recoveries" in class actions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

In light of the benefits that arbitration can provide, Congress has encouraged parties to arbitrate disputes in accordance with the contracts they have executed. *See* 9 U.S.C. § 2. However, "the FAA's legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding – apart from its non-judicial nature, it has little in common with what Congress approved in 1925." David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 57 (Nov. 2007) ("*An Uninvited Guest*") (emphasis in original). In this regard, proponents of the FAA who testified before Congress described arbitration as: (1) purely voluntary; (2) "face to face" in nature; and (3) prompt, inexpensive and procedurally streamlined. *Id.* at 59-60.

One leading arbitration advocate characterized arbitration as "something so much cheaper than litigation that . . . its use would reduce the price of

consumer goods. . . .'" *Id.* at 59 n.16 (citations omitted). Another leading advocate advised Congress that arbitration would avoid long delays resulting from court congestion, preliminary motions and other steps taken by litigants. *Id.* at 59. Accordingly, Congressional reports recommending adoption of the FAA made clear that, "when it enacted the FAA, Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined – in other words, just the type of proceeding that had been described by the witnesses during the pre-enactment hearings." *Id.* at 61.

Class arbitration, of course, shares *none* of the attributes of the arbitration contemplated by Congress. *Id.* at 62-66. Opt-out class arbitration conducted roughly in accordance with Fed. R. Civ. P. 23, as some arbitrator may choose to apply it, is certainly *not* voluntary and does not provide a company with an opportunity to meet "face-to-face" with putative class members who may (or may not) feel aggrieved. And class-action procedures inherently conflict with the speed, simplicity, cost savings, informality and reduction in adversarial behavior arbitration was designed to achieve. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

In effect, superimposing class-action procedures on arbitration "brings the burdens of litigation into the arbitral forum. . . . [T]he greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration . . . lessens the distinction between the two

processes." Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. Disp. Resol. 259, 272; *accord* Lindsay R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 649 (class procedure "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration"). Thus, class arbitration, which attempts to combine two separate and distinct forms of dispute resolution, creates an unworkable tangle inferior to *both* a true judicial or arbitral forum.

Not only is class arbitration inconsistent with the streamlined procedures that are the *sine qua non* of the individual arbitration contemplated by the FAA, class arbitration generates unique costs. For example, the "clause construction" determination, which addresses whether a particular agreement permits class arbitration, has no counterpart in the courts. Clause construction disputes can be time-consuming and costly. *See An Uninvited Guest*, at 63-64. *See also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 2009 U.S. LEXIS 4345, 77 U.S.L.W. 3678 (June 15, 2009) (granting *certiorari* in case where parties have disputed availability of class arbitration since 2004). Thus, class arbitration creates delays and costs incompatible with the expectations of parties who bargained for individual arbitration.

The cost disadvantages of class arbitration are hardly the only (or worst) ones. Any class-wide arbitral award would be reviewable only for fraud, bias or gross misbehavior of the arbitrator. *See* 9 U.S.C. § 10; *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (holding that parties may not contractually expand the grounds for appealing arbitration awards). Many companies are willing to risk an erroneous decision in an *individual* arbitration because of the cost savings inherent in arbitration and the desire to pursue a less adversarial way of resolving customer disputes. However, the calculus changes dramatically if the arbitration provision must allow for class proceedings. As one member of this Court commented in referring to class arbitration proceedings: "You might not want to put your company's entire future in the hands of one arbitrator." *See* Tr. of Oral Argument, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *available at* 2003 WL 1989562, at *29.

Of course, Amex and its merchants agreed to *individual* arbitration of their disputes; they did *not* agree to class arbitration. "The arbitrator has no authority, *sua sponte*, to assert jurisdiction over a contracting party who has never appeared or agreed to an arbitration proceeding or a modification of his or her contract." Edward C. Anderson & Kirk D. Knutson, *"Class" Arbitration? What About the Rights of Absent "Class" Members?*, 7 Engage 148, 151 (2006), http://www.fed-soc.org/doclib/20080214_LitAndreson.pdf ("*Class Arbitration*"). And the lack of judicial

involvement and oversight of classwide arbitration raises significant due process concerns about the protection of absent class members. *See An Uninvited Guest* at 75-78. In enacting the FAA in 1925, well before Rule 23 was added to the Federal Rules in 1966, Congress clearly did not contemplate classwide arbitration.[2]

In short, the inevitable consequence of permitting the Panel decision to stand would be to substitute a Rule 23 class action in court for the individual arbitration to which the parties agreed. This is why Amex declared at oral argument that it would "reconsider" its intention to proceed to arbitration should the Panel refuse to enforce the class action waiver and why the Panel remanded the case to allow Amex the opportunity to withdraw its motion to compel arbitration. App. 42a-43a.

### C. Compelling Individual Arbitration Will Not Serve To Exculpate Amex.

Notwithstanding Congress' considered decision *not* to provide for class actions under the antitrust

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[2] This Court has warned that courts should be "mindful that Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 612 (citing 28 U.S.C. § 2072(b)). This Court recently granted *certiorari* in *Stolt-Nielsen S.A.* to decide whether imposing class arbitration without express contractual authority is consistent with the FAA.

laws, the Panel below suggested that "[c]orporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims." App. 39a (quoting *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007)). However, even putting aside the fact that Respondents *can* vindicate their rights in individual proceedings against Amex (*see* Section II, *infra*), the threat and reality of government enforcement provide a powerful brake on improper conduct and an effective remedy for any wrongdoing that does occur.[3]

The U.S. Department of Justice (the "DOJ"), the Federal Trade Commission (the "FTC") and state attorneys general all play an aggressive role in enforcing the antitrust laws. Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25, give the DOJ authority to

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[3] A number of courts have relied upon government enforcement mechanisms in upholding the validity of arbitration agreements with class action prohibitions. *See, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 375-76 (3d Cir. 2000) (even if class actions are not available in arbitration, numerous administrative mechanisms exist to enforce TILA); *accord, Gay v. CreditInform*, 511 F.3d 369, 381 (3d Cir. 2007), *reh'g denied* (Jan. 29, 2008); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818 (11th Cir. 2001). *See also Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1292 (M.D. Ala. 2003) (sustaining class action waiver in arbitration agreement in view of administrative enforcement mechanisms for ECOA violations and the federal policy favoring arbitration); *In re Universal Service Fund Tel. Billing Practices Lit.*, 300 F. Supp. 2d 1107, 1137-38 (D. Kan. 2003).

obtain preliminary and permanent injunctions, divestitures, rescission and forfeitures. The DOJ has been particularly aggressive in enforcing antitrust laws in the payment cards industry. In litigation culminating in 2004, the DOJ forced VISA and MasterCard, the two leading card networks, to discontinue enforcing rules prohibiting member institutions from issuing Amex and Discover cards. *U.S. v. VISA U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004). Thereafter, the DOJ forced VISA to abandon plans to require merchants to treat VISA debit cards differently for PIN and signature transactions. *See* Press Release, Dept. of Justice, *Visa Inc. Rescinds Debit Card Rule as a Result of Department of Justice Antitrust Investigation* (July 1, 2008) (http://www.justice.gov/opa/pr/2008/July/08-at-582.html).

Additionally, the DOJ frequently brings criminal prosecutions under the Sherman Act. Section 1 of the Sherman Act, 15 U.S.C. § 1, the most commonly used criminal antitrust provision, establishes imprisonment and fines for individuals of up to ten years and $1 million and fines for corporations of up to $100 million for each count. The DOJ has the authority to seek greater fines under 18 U.S.C. § 3571, equal to twice the gross financial loss or gain resulting from a violation.

Section 5 of the FTC Act, 15 U.S.C. § 45, gives the FTC authority to seek remedies that include: (1) penalties up to $16,000 per violation, 15 U.S.C. § 45(m); (2) injunctions and ancillary relief, 15 U.S.C.

§ 53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers . . . [including] rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages. . . ." 15 U.S.C. § 57b(b). *See also FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (asset freeze).

In sum, even accepting for the sake of argument that the unavailability of class proceedings lessens to some extent the efficacy of private proceedings to deter and redress antitrust violations, the array of government enforcement mechanisms ensure that a provision requiring individual arbitration does not serve as an exculpatory clause.

## II. The Panel Departed From Guiding Precedents In Assuming The Arbitration Agreement Would Be Misapplied And In Failing To Apply Established And Pro-Arbitration Contract Interpretation Principles To The Arbitration Agreement's Confidentiality Provision.

The Panel invalidated the individual arbitration requirement in the Amex arbitration agreement for the sole reason that, in the Court's view, the waiver would effectively preclude Respondents from pursuing

their antitrust claims. Amex explained in its Petition that the Panel misconstrued this Court's decision in *Randolph* when it: (1) concluded that costs Respondents would necessarily incur either in litigation or arbitration could justify invalidation of the individual arbitration requirement of the Amex arbitration agreement; and (2) prejudged in advance of arbitration the costs that Respondents would necessarily bear in arbitration. Pet. Cert. 18-20. By contrast, *Randolph* teaches that the party opposing arbitration must prove that arbitration costs will prevent it from vindicating its rights and prior cases establish that arbitration agreements must be enforced as written, like other agreements, but with a healthy regard to the pro-arbitration policies at the heart of the FAA. *Randolph*, 531 U.S. at 92. In ignoring this Court's guidance, the Panel produced an improper result profoundly hostile to arbitration.

### A. The Panel Decision Rests On An Inappropriate *Assumption* How The Arbitration Agreement's Confidentiality Provision Would Be Applied.

The decision below relied on expert testimony that it would cost in excess of $200,000, and perhaps $1 million or more, for an Amex merchant to commission an expert report that would be needed to litigate an antitrust claim against Amex. *See* App.

29a-37a.[4] The Panel thought it obvious that no Respondent would bring an individual arbitration against Amex, for estimated treble damages ranging from approximately $9,000 to approximately $39,000, when the Respondent's expert report would cost in excess of $200,000. *Id.* at 32a-33a (citing affidavit of Respondent's expert).

In comparing Respondents' potential monetary recovery to the expert witness fees Respondents would need to incur, the Panel did not seem to weigh the value of any injunctive relief Respondents might obtain. More fundamentally, Amex argued below that Respondents "could reach an agreement as to how the experts' cost of preparation could be shared." *Id.* at 36a (internal quotation marks omitted); *see also* Pet. Cert. 20-21 (criticizing Panel's treatment of this issue). While the record does not specify the number of Amex merchants, it is clear that a very small percentage could share the cost of a single expert in their individual proceedings for a manageable if not *de minimis* outlay, even if the total cost for the expert would approximate $1 million, an amount towards the high end of the range estimated by Respondents' expert.

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[4] The Panel acknowledged that "an individual arbitration brought by a plaintiff will likely cost less than a trial in federal district court" but did not regard this likelihood as being significant. App. 36a n.14.

The Panel, however, dismissed Amex' argument out of hand:

> This is an intriguing proposition, but we do not believe it can survive the application of the following provision of the arbitration clause in the Card Acceptance Agreement: "The arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Thus, any proposal that the plaintiffs share the services of expert witnesses employed in the *Marcus* action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with *anyone*.

App. 36a (emphasis in original). The Court's conclusion that merchants could not share an expert (or the costs of an expert) was an essential link in the chain of argument leading to the Court's invalidation of the class action waiver (and, effectively, the arbitration agreement in its entirety – *see* Section I-B, *supra*).

*Randolph* makes clear that courts may not refuse to enforce arbitration agreements as written based on rank speculation as to arbitration costs. *Randolph*, 531 U.S. at 91 (holding that, where an arbitration agreement was silent as to costs, the "risk" that the plaintiff would "be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement"). Nevertheless, the Panel

*assumed* that Amex would seek to apply the confidentiality provision to interfere with effective cost-sharing arrangements by its merchants and that an arbitrator would allow Amex to get away with this kind of stratagem. There is absolutely no basis for this speculation.

### B. The Panel Failed To Apply The Arbitration Agreement's Confidentiality Provision As Written, In Violation Of The FAA's Policy Favoring Arbitration And Contract Construction Principles Established Outside The Arbitration Context.

Under this Court's precedents, the Panel was required to construe the arbitration agreement and its confidentiality provision from a pro-arbitration stance. *See Mitsubishi Motors Corp.*, 473 U.S. at 626; *Moses H. Cone*, 460 U.S. at 24-25. Instead, the Panel fundamentally departed from prevailing contract construction principles in order to *invalidate* a core part of the arbitration agreement.

The Panel cited *no* authority and provided *no* explanation for its *ipse dixit* conclusion that the confidentiality clause was fundamentally incompatible with a cost-sharing regimen for a single expert who could provide the testimony needed for merchants to contest the Honor all Cards Rule in individual arbitration proceedings. Certainly, the confidentiality provision does not preclude a single attorney or law firm from representing multiple

plaintiffs in separate proceedings. By the same token, it does not prevent a single expert from assisting counsel in its work. An extreme prohibition of this type would need to be articulated in the clearest possible language and not through a logical leap from a provision that says nothing about either experts or costs.

Potentially, an expert might need to submit a "new" report or provide "new" testimony for each individual arbitration. However, once the expert has climbed the learning curve on his or her first report and first visit to the witness stand, the cost of further assistance is not likely to be great. There is no reason at all to believe that the potential costs or inconveniences created by the agreement's confidentiality provision – all of which are entirely speculative – would prevent a determined group of merchants from vindicating their rights under the antitrust laws.[5]

The Panel's treatment of the confidentiality provision violates several fundamental contract interpretation principles. *First*, in equating a restriction on sharing *confidential information* (which appears in the arbitration agreement) with a prohibition against sharing *costs* (which is absent from the agreement),

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[5] Even if Respondents could show that the arbitration agreement creates some measure of inconvenience to them, such a showing would be irrelevant. *See Moses H. Cone*, 460 U.S. at 20 (FAA requires piecemeal dispute resolution when necessary to give effect to an arbitration agreement); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (same).

the Court disregarded the principle that contracts should be interpreted in accordance with their plain language. *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 31 (2004) (giving effect to plain language of maritime contract); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (providing that the "arbitrator may not ignore the plain language of the contract"). It also violated Sections 2 and 3 of the FAA, 9 U.S.C. §§ 2-3, which command that arbitration agreements shall be enforced in accordance with their terms. *See Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (stating that FAA § 2 was crafted to "ensur[e] that private arbitration agreements are enforced according to their terms").

*Second*, the Court failed to give the confidentiality provision a construction that would have validated the entire arbitration agreement. Instead of affording the provision a reasonably straightforward, narrow construction, it stretched the contract language beyond the breaking point in order to *invalidate* the agreement's critical individual arbitration requirement.

The Second Circuit outside the arbitration context – but not the Panel here –has applied the universally applicable principle favoring reasonable contract constructions that validate an agreement. *See Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465-66 (2nd Cir. 1970) ("A construction that will sustain an instrument will be preferred to one that will defeat it; *Ga Nun v. Palmer*, 216 N.Y. 603,

111 N.E. 223 (1916); *accord: Silverman v. Alpart*, 282 App.Div. 631, 125 N.Y.S.2d 602 (1953); if an agreement is fairly capable of a construction that will make it valid and enforceable, that construction will be given it. *M. O'Neil Supply Co., Inc. v. Petroleum Heat & Power Co.*, 280 N.Y. 50, 19 N.E.2d 676 (1939) . . . Where a letter of credit is fairly susceptible of two constructions, one of which makes it fair, customary and one which prudent men would naturally enter into, while the other makes it inequitable, the former interpretation must be preferred to the latter, and a construction rendering the contract possible of performance will be preferred to one which renders its performance impossible or meaningless. *See Liberty Nat'l Bank & Trust Co. v. Bank of American Nat'l Trust & Savings Ass'n*, 218 F.2d 831, 840 (10 Cir. 1955).").

By interpreting the confidentiality clause in a manner that created problems, the Panel not only ignored its own precedent, it departed from the mode of analysis employed by the D.C. Circuit in *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (giving validating construction to an ambiguous cost allocation provision in an arbitration agreement). *See also* 11 Richard A. Lord, Williston on Contracts § 32:11, at 453-54 (4th ed. 1999) ("Consonant with the principle that all parts of a contract be given effect where possible, an interpretation which renders a contract lawful is preferred to those which render it unlawful. Similarly, interpretations which render the contract valid or its performance possible are

preferred to those which render it invalid or its performance impossible.") (footnotes and citations omitted). The Panel afforded the confidentiality provision this construction even though it knew that its action was likely to result in effective invalidation of the *entire* arbitration agreement (including, of course, its individual arbitration requirement *and* confidentiality provision). *See* App. 42a (acknowledging "Amex' declar[ation] at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver").

In sum, the Panel turned prevailing contract construction principles on their head: Instead of giving the confidentiality clause a normal construction that would have validated the entire arbitration agreement in accordance with its terms, the Panel twisted the language of the provision to effectively invalidate the entire agreement. Of course, a mode of analysis that singles out arbitration for special treatment conflicts with the FAA. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Southland Corp.*, 465 U.S. 1. This Court should grant *certiorari* to resolve the split in authority created by the Panel decision and assure that the lower courts follow their mandate to liberally enforce arbitration agreements in keeping with their terms.

## CONCLUSION

For the foregoing reasons and the reasons set forth in Amex' Petition for a Writ of *Certiorari*, *Amici* respectfully request that this Court grant the Petition.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

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No. 08-1473

IN THE

# Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *ET AL.*,

*Petitioners*,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, *ET AL.*,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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IN THE

# Supreme Court of the United States

No. 08-1473

AMERICAN EXPRESS COMPANY, *ET AL.*,

*Petitioners*,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, *ET AL.*,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF AMICUS CURIAE OF THE BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

[1] Pursuant to Sup. Ct. R. 37.2, amicus states that counsel for all parties received notice of *amicus*'s intention to file this brief at least 10 days prior to filing. Pursuant to Sup. Ct. R. 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief through consent letters filed with the Clerk's Office.

Amicus curiae the Business Roundtable is an association of approximately 160 chief executive officers of leading corporations with a combined workforce of nearly ten million employees and more than $5 trillion in annual revenues. The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles. It regularly participates as an amicus in Supreme Court matters affecting its members' interests. *See, e.g., Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Credit Suisse Securities (USA) LLC* v. *Billing*, 551 U.S. 264 (2007); *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

The Business Roundtable has a strong interest in this case; the two questions presented in the petition have enormous legal and practical importance for its members. Business Roundtable members enter into contracts every year that involve agreements to arbitrate disputes; many of those contracts contain class action waiver provisions. Such agreements provide Business Roundtable members and their contracting partners with the assurance that their business disputes will be resolved in the fair and cost-effective forum of an arbitration proceeding.

Business Roundtable members rely on the vigorous enforcement of arbitration agreements by federal courts—as mandated by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA")—to ensure that their contractual right to employ alternative dispute resolution processes is respected. The District Court properly enforced the parties' valid and unequivocal agreement to arbitrate by compelling arbitration

according to the terms of the arbitration clause. Yet the Second Circuit reversed, in a decision that puts that court not only in conflict with the dictates of this Court and some of its sister circuits, but with the dictates of the FAA itself. A voluntary agreement to arbitrate, accompanied with an (equally voluntarily) agreement to cede the option of pursuing claims through the class action mechanism, should be honored according to its terms. Voiding such voluntary covenants renders the arbitration provisions of business contracts meaningless verbiage to be ignored at will and without consequence by discontented parties. This in turn promises to undermine the efforts of the business community—and arbitration entities themselves—to develop and implement cost-effective means of resolving disputes. This Court should grant certiorari.

## SUMMARY OF ARGUMENT

When the Second Circuit intervened to invalidate a term in an arbitration contract, it effectively disregarded one of the fundamental tenets of the Federal Arbitration Act: the importance of honoring and enforcing parties' voluntary agreements to resolve their disputes through arbitration. The Second Circuit's approach is reminiscent of pre-FAA anti-arbitration sentiments; and its ultimate decision conflicts with prior decisions from many of its sister circuits and from this Court. The court of appeals' revision of the parties' agreement and its intrusion into matters typically left to the parties' private bargaining also promises extensive and undesirable consequences for other arbitration agreements in

commercial contracts. Certiorari should be granted and the Second Circuit's ruling reversed.

## ARGUMENT

### I. A CLASS ACTION WAIVER DOES NOT PREVENT MERCHANTS LIKE RESPONDENTS FROM VINDICATING THEIR RIGHTS UNDER THE ANTITRUST LAWS.

The Federal Arbitration Act announces a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985), and "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA thus "requires that [courts] rigorously enforce agreements to arbitrate." *Byrd*, 470 U.S. at 221. To that end, this Court has made clear that "as a matter of federal law, any doubts concerning * * * arbitrab[ility] * * * should be resolved in favor of arbitration." *Mitsubishi Motor Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Yet despite the judicial (not to mention statutory) stance preferring arbitration, the Second Circuit invalidated a voluntarily agreed-upon, enforceable arbitration agreement.

When it "agree[s] to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." *Mitsubishi*, 473 U.S. at 628. Relying on *Mitsubishi*, the Second Circuit held that because

the merchant respondents had waived their right to pursue arbitration as a class, they could not effectively vindicate their "substantive rights" under the antitrust statutes in an arbitration proceeding. Pet. App. 30a. This Court, however, held in *Mitsubishi* itself that a plaintiff can effectively pursue antitrust claims through individual arbitrations. 473 U.S. at 628-639. The court of appeals accordingly was constrained to place great emphasis on the respondent merchants' contention that because their claims are small they cannot effectively pursue them in this case except through a class action. Pet. App. 30a. On the basis of this perceived *Mitsubishi* loophole, the court of appeals voided both the merchants' voluntary agreement to arbitrate their dispute and their agreement to waive their right to pursue their claims through a class action. *Id.* at 39a.

The court of appeals neglected to reconcile its decision with other precedent from this Court rejecting just that approach, however. In *Gilmer*, for example, this Court considered whether a claim under the Age Discrimination in Employment Act of 1967 ("ADEA") could be subject to compulsory arbitration. *See* 500 U.S. at 23. The petitioner there contended that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for * * * class actions." *Id.* at 32. This Court rejected that proposition: as it explained, "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation" were inadequate to vindicate a

plaintiff's rights under the statute. *Id.* (internal quotation omitted; brackets in original). So too here. The respondent merchants were and are in no worse position than an individual—and arguably in a far better position—to press antitrust claims without relying on Rule 23's class action procedures.

When it took up the question whether statutory claims can be referred to arbitration if the plaintiff will be prevented from pursuing its claims in a class action, the Third Circuit arrived at a conclusion contrary to the Second Circuit here. *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 368 (3d Cir. 2000). Writing for the court, Judge Becker began by noting that neither statute in that case—the Truth in Lending Act ("TILA") and the Electronic Fund Transfer Act ("EFTA")—"confers upon plaintiffs the right to proceed as a class. Instead the right is merely a procedural one, arising under Fed. R. Civ. P. 23, that may be waived by agreeing to an arbitration clause." *Id.* at 369. Put another way, the right to participate in a class action is not a "substantive" statutory right whose vindication can justify voiding an arbitration clause. *See id.* at 374. As the court explained, "even if plaintiffs who sign valid arbitration agreements lack the *procedural* right to proceed as a part of a class, they retain the full range of rights created by the TILA * * * in individual arbitration proceedings." *Id.* at 373 (emphasis added). That is because "arbitration does not eliminate plaintiff[s'] incentives to assert rights under the Act." *Id.* at 374. Nor "will arbitration necessarily choke off the supply of lawyers willing to pursue claims"; attorney's fees are recoverable by a prevailing party. *Id.* In the end, the Third Circuit concluded, "[w]hatever the benefits of class actions,

the FAA requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 375 (internal quotation omitted).

Other courts of appeal have in recent years agreed with this Court and with the Third Circuit's exposition in *Johnson*—thus deepening the conflict with the Second Circuit's decision here. The Eleventh Circuit, for example, repeatedly has held that "a contractual provision to arbitrate * * * claims is enforceable even if it precludes a plaintiff from utilizing class action procedures." *Randolph* v. *Green Tree Fin. Corp.-Alabama*, 244 F.3d 814, 819 (11th Cir. 2001); *see Dale* v. *Comcast Corp.*, 498 F.3d 1216, 1222 (11th Cir. 2007); *Jenkins* v. *First Am. Cash Advance of Ga., LLP*, 400 F.3d 868, 878 (11th Cir. 2005). Like the Third Circuit before it, the Eleventh Circuit concluded that a plaintiff could vindicate its rights through individual arbitrations—particularly in light of the fact that a victorious party could recover attorney's fees. *See Jenkins*, 400 F.3d at 878.

The Fourth Circuit similarly has rejected a plaintiff's argument that an arbitration agreement is unenforceable because "without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages." *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (potential recovery of attorney's fees obviates the need for a class action). And the Seventh Circuit similarly has emphasized that "[a] procedural device aggregating multiple persons' claims in litigation does not entitle anyone to *be* in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants." *Caudle* v.

*American Arbitration Ass'n.*, 230 F.3d 920, 921 (7th Cir. 2000) (emphasis in original). *See also In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 259 (S.D.N.Y. 2005), *amended in part*, 2005 WL 1871012 (S.D.N.Y Aug 9, 2005). *But see Kristian* v. *Comcast Corp.*, 446 F.3d 25, 57-59 (1st Cir. 2006) (concluding that individual consumers in that particular case could not pursue their rights other than by cost-sharing through a class action mechanism).

As with the plaintiffs in *Gilmer*, *Johnson*, *Randolph*, *Snowden* and *Caudle*, the respondents here opted contractually to relinquish their right to pursue claims in a class action. And as with the plaintiffs in *Gilmer*, *Johnson*, *Randolph*, *Snowden*, and *Caudle*, that voluntary choice provides no grounds for invalidating their arbitration agreement. The respondents have no *substantive* right under the federal antitrust laws to participate in a class action in a federal court; they have only a *procedural* right under Rule 23. That procedural right is waivable, and these respondents waived it when they entered into an arbitration agreement that foreclosed class proceedings. Respondents are bound by their covenants.

The Second Circuit, however, disregarded all of these precedents, instead asserting that the respondents' claims could "only be pursued through the aggregation of individual claims." Pet. App. 33a. When it dictated that radical revision to the terms of the parties' arbitration agreement, the court of appeals fundamentally altered the bargain struck between millions of parties in existing business agreements, rendering the enforcement provisions of

the FAA a nullity with respect to arbitration clauses containing class-action waivers. This is not what Congress intended when it enacted the FAA. And it is not what parties—particularly sophisticated commercial parties like these respondents—bargain for when they enter into such agreements. A plaintiff's agreement to waive its right to bring a class-wide arbitration does not void its agreement to arbitrate disputes. This Court should confirm its own teachings—and those of the great majority of the other courts of appeals—by granting certiorari and reversing the Second Circuit's decision.

## II. MERCHANTS LIKE RESPONDENTS CAN AND DO EFFECTIVELY PURSUE THEIR ANTITRUST CLAIMS THROUGH INDIVIDUAL ARBITRATION PROCEEDINGS.

This Court in *Green Tree Financial Corp.-Alabama* v. *Randolph* stated that "[i]t may well be that the existence of large arbitration costs could preclude a litigant * * * from effectively vindicating [its] federal statutory rights in the arbitral forum." 531 U.S. 79, 90 (2000). Seizing on this statement, respondents argued below that it would be prohibitively expensive for them to arbitrate their claims individually and that they accordingly must be allowed to pursue them collectively in a class action in federal court. The Second Circuit adopted respondents' argument in its essentials. Pet. App. 33a-39a.

Both respondents and the court of appeals, however, misunderstood *Green Tree*. This Court's point of concern was that "*arbitration costs*"—such as "the cost of the arbitrator or administrative fees"—that might not be incurred (or would be less

burdensome) in litigation in federal court could preclude a plaintiff from pursuing its claims in an arbitration as it would have been able to in a court. *See Green Tree* at 90 & n.6 (emphasis added); *see also Bradford* v. *Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 n.5 (4th Cir. 2001) ("The cost of arbitration * * * cannot be measured in a vacuum * * * an appropriate case-by-case inquiry must focus upon a claimant's expected or actual arbitration costs * * * measured against a baseline of the claimant's expected costs for litigation."). This Court has never suggested that costs that are *not* unique to an arbitration—such as attorney's or expert's fees—can justify voiding an agreement to arbitrate.

The merchant respondents nonetheless successfully contended below that the potential for high attorneys' fees foreclosed pursuing low-dollar antitrust claims in individual arbitrations. Section 4 of the Clayton Act, of course, guarantees that reasonable attorneys' fees are recoverable in arbitration. 15 U.S.C. § 16. But the Second Circuit concluded that this fee-shifting arrangement "does not solve the problem" of burdensome arbitration costs, because Plaintiffs face the "risk of losing, and thereby not recovering any fees." Pet. App. 35a. But the "risk of losing" is not unique to arbitration. And the court's strained reasoning runs counter to the established precept that fee-shifting provisions eliminate any obstacle that attorneys' fees pose to pursuing individual claims in arbitration. *See, e.g.*, *Snowden*, 290 F.3d at 638; *Jenkins*, 400 F.3d at 878; *Johnson*, 225 F.3d at 374.

The respondents also tellingly did not contend below that any one of them could not individually pay expert fees (which, after all, also would be payable in federal court); they contended only that doing so would not be prudent given the small value of their claims. But that is not enough to void their contract. Parties bound to arbitrate are not entitled to opt out of their covenant merely because another forum may present a more cost-effective means of vindicating their rights; they are relieved from an arbitral obligation only when it essentially eliminates their ability to vindicate their rights *at all*. *See Randolph*, 531 U.S. at 90. The respondent merchants here are businesses, including some with total annual sales in the tens of millions. *See* Ct. App. J.A. 365. They can bear the expense of expert fees.

Even if expert fees imposed a burden on some hypothetical parties (though not these parties), moreover, the Second Circuit gave curiously little attention to the alternative mechanisms to formal class-action proceedings that may effectively lower the cost of retaining experts. While finding the proposition of fee-sharing arrangements "intriguing," for example, the court of appeals opined that confidentiality provisions in arbitration agreements might bar plaintiffs (including these) from sharing expert reports. Pet. App. 36a. But experts generally are not bound by confidentiality agreements they have not signed. *See Industrial Risk Insurers* v. *M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998); Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 Am. U. Int'l L. Rev. 969, 1006 (2001). And even if

expert witnesses were in some cases bound by confidentiality agreements, other cost-sharing mechanisms exist. To name an obvious one, small-scale plaintiffs often rely on research sponsored and publicly distributed by consumer or small-business associations. *See, e.g.*, Public Citizen, *Public Citizen's Involvement in Class Action Settlements*, *available at* http://www.citizen.org/litigation/briefs/Class_Action/articles.cfm?ID=552 (last visited June 16, 2009). The Second Circuit's unseemly eagerness to itself weigh and resolve questions about the arbitration market's tolerance for cost-sharing likely spells an end to these and other creative and efficient cost-sharing solutions in the single-claim arbitral context.

The Second Circuit's musings about burden also should be tempered with facts. This Court and numerous others have recognized that arbitrations often provide a *better* forum than federal courts for prosecuting low-dollar claims. *See, e.g.*, *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001) ("[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance * * * [where] smaller sums of money" are at stake); *Cooper* v. *MRM Inv. Co.*, 367 F.3d 493, 498 (6th Cir. 2004) (same); *Metro E. Ctr. for Conditioning & Health* v. *Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002) ("An arbitral forum can serve as a sort of small-claims tribunal in a way that a federal district court cannot."); *see also International Union of Operating Eng'rs, Local 139* v. *J.H. Findorff & Son*, 393 F.3d 742, 745 (7th Cir. 2004) ("arbitration * * * is designed to * * * lower cost"); *EEOC* v. *Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 1002 (9th Cir. 2002) ("lower costs" is a "real benefit[ ] to

the enforcement of arbitration provisions"); *Schmidt* v. *Finberg*, 942 F.2d 1571, 1573 (11th Cir. 1991) ("the basic policy of conducting arbitration proceedings is to offer means of deciding disputes expeditiously with lower costs than in ordinary litigation"). Whatever costs parties bear in procuring expert testimony in this case, in other words, might well be offset by the cost *savings* of conducting an arbitration proceeding rather than an all-out federal trial.

The Second Circuit nonetheless opined that the amount of time and money respondents might save from engaging in arbitration rather than litigation was immaterial, because the merchants had "demonstrated to [its] satisfaction that *neither* an individual arbitration, *nor* an individual litigation would make any economic sense in light of the likelihood that expert fees far in excess of any likely individual recovery would need to be expended in either action." Pet. App. 36a n.14 (emphasis in original). The court did not consider, however, that the cost savings of choosing arbitration may be so great as to render the process even more accessible than class-action suits. It is not difficult to imagine, after all, that a group of complainants would rather bring individual claims before arbitrators—and receive full awards within four to six months of filing—rather than wait several years in litigation only to receive a very small portion of a settlement agreement. *See* American Arbitration Association, *Analysis of the American Arbitration Association's Consumer Arbitration: Based on Consumer Cases Awarded Between January and August 2007*, *available at* http://www.adr.org/si.asp?id=5027 (last visited June 16, 2009). If indeed, in some cases, arbitration, even individual arbitration, is less costly

than litigation, this analysis cannot be immaterial in deciding whether to enforce such agreements.

## III. THE SECOND CIRCUIT'S HOLDING WILL INCREASE CONSUMER PRICES, REDUCE ACCESS TO ARBITRATION, AND CONSTRAIN MARKET REFORMS.

When it invalidated the class-action waiver at issue here, the Second Circuit inserted the following caveat: "[W]e stress that we do not hold here that class action waivers in arbitration agreements are *per se* unenforceable." Pet. App. 41a. But as American Express rightly notes in its petition, "it is difficult to think of a case in which an individual consumer or a business that purchases goods will have suffered damages high enough to be able to bring an individual suit under the Second Circuit's sweeping test." Pet. 31. Quite so. Given the number of agreements this rule would invalidate, and the Second Circuit's unique position in influencing commercial transactions nationwide, the costs associated with the circuit court's errant ruling promise to be considerable. And those costs include higher consumer prices, fewer chances to arbitrate claims, and an obstruction of market forces, which in recent years have shown a tendency toward making the arbitration industry more accessible to individual consumers and small businesses.

One cost that will almost surely result from non-enforcement of these agreements is a rise in the price of the product or service that is the subject of the dispute. In a competitive market environment, reduced litigation costs to business will be passed on to customers in the form of lower prices or better services. Conversely, high litigation costs get passed

on as well, in the form of higher prices or service constraints. When courts refuse to enforce class action waivers in arbitration agreements, the attendant higher risk of facing a class-action claim will drive up prices for customers. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – With Particular Consideration of Class Action and Arbitration Fees*, 5 J. Am. Arb. 251, 256 (2006).

The Second Circuit's refusal to uphold these agreements also may result in a significant drop in the number of arbitrations available to interested customers. Class-action arbitrations involve discovery, class certification, and class settlement formalities, each of which raises the costs of arbitration considerably. *See* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring The Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, ___ Cornell J. L. & Pub. Pol. (*forthcoming* Spring 2009). And given that class action *arbitration* is a relatively new procedure, many companies prefer to defend against a class action *litigation*, a "devil they know," rather than risk a bad result with an untested device. *See* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. Chi. L. Rev. 157, 179 (2006) ("The 'devil you know' phenomenon is compounded by the uncertainty of judicial review of class certification in arbitration and the concomitant fear of a 'renegade arbitrator' certifying a class and exposing a company to massive liability.").

Due to these and other related concerns, many companies make class-action waiver provisions non-

severable from the entire arbitration agreement—meaning that if the waiver is invalidated, then the entire agreement fails. Thus, in its attempt to preserve the "arbitrability" of Plaintiffs' claims (while dictating certain edits and emendations to the parties' arbitration agreement), the Second Circuit may have eliminated their arbitration altogether. This perverse result negatively impacts those complainants who, as this Court has put it, prefer to "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.

Finally, the Second Circuit's diktat may restrict or terminate the market's natural progression toward providing low-cost alternatives to class-action proceedings. In the past few years, the arbitration industry, in competing for small claim-holders, has voluntarily capped filing fees for customers (even waiving fees for indigent parties), given individuals the right to hearings in "hometown areas," and guaranteed access to information for discovery. *See Arbitration Under Attack* at 25-28; *see also* Jeff Neilsen *et al.*, Navigant Consulting, National Arbitration Forum: California Consumer Arbitration Data, *available at* http://www.instituteforlegal-reform.com/issues/doc-load.cfm?docId=1212 (visited last on June 16, 2009) (finding that in 99.3% of the 33,689 National Arbitration Forum consumer arbitrations between January 1, 2003 and March 31, 2007, consumers paid no arbitration fees, and in the remaining 0.7%, consumers paid a median fee of $75). Similarly, in order to encourage customers to use individual arbitration to file grievances, some companies have begun to offer significant premiums

for plaintiffs who choose to file complaints before arbitrators. *See Arbitration Under Attack* at 33-37. These and other innovative methods and agreements preserve the parties' freedom to contract, while also providing effective alternatives to costly class-action suits. In its haste to dictate the terms of these and millions of similarly situated parties' arbitral agreements, however, the Second Circuit likely forestalled the arbitration market's natural response to the needs of low-value claim-holders.

## CONCLUSION

For the foregoing reasons, as well as those presented in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 08-1473

IN THE

# Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*,
*Petitioners*,

v.

ITALIAN COLORS RESTAURANT, on behalf of itself and all similarly situated persons, *et al.*,
*Respondents*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR VERIZON COMMUNICATIONS INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS


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IN THE
# Supreme Court of the United States

No. 08-1473

AMERICAN EXPRESS COMPANY, *et al.*,
*Petitioners*,

v.

ITALIAN COLORS RESTAURANT, on behalf of itself and all similarly situated persons, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR VERIZON COMMUNICATIONS INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

## INTEREST OF *AMICI CURIAE* [1]

Amicus Verizon Communications Inc. is a national telecommunications company that offers a range of

[1] All parties received timely notice of, and have consented to, the filing of this brief. The parties' blanket letters of consent are on file with the Clerk.

No counsel for a party has written this brief in whole or in part, and no person or entity other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

consumer and business services such as telephone, internet and video programming. Amicus National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and all 50 states. As part of their business dealings, Verizon and various members of the NAM have entered into contractual agreements in which the parties agree to arbitrate any disputes arising between them and further agree that the arbitration will proceed on an individual, rather than a class, basis. In addition, Verizon and members of the NAM have been defendants in large-scale class actions, including actions asserting claims under the federal antitrust laws. *See, e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (nationwide class of local telephone and internet customers). Thus, Verizon and the NAM have a direct interest in whether the antitrust laws mandate that certain agreed-upon class action waivers be deemed unenforceable.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have demonstrated that the decision below is contrary to the language and purposes of the Federal Arbitration Act and thus merits further review. *See* American Express Petition 11-33. In addition, however, this case presents important related questions about whether, and to what extent, the federal antitrust laws preclude contractual class action waivers. The Second Circuit refused to enforce a class action waiver agreed to by American Express and certain merchants "because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." Pet. App. 39a. But

the Second Circuit's analysis is flawed on several grounds: *first*, it gives too little weight to the presumption that parties to an agreement may freely waive procedural rights, even those granted by a federal statute or rule; and, *second*, in finding a waiver of class actions to be incompatible with the antitrust laws, it failed to look in detail at the relationship between class actions and antitrust standards, including the substantial threat that class actions can pose to antitrust goals and the availability of other remedial mechanisms. Review by this Court is warranted to consider those issues as well.

**I.** The well-established general rule is that parties to an agreement are free to waive their constitutional and statutory rights. *See, e.g., New York v. Hill*, 528 U.S. 110, 114 (2000). This Court has repeatedly enforced voluntary waivers—despite later attempts to disavow them—both in criminal cases, *see, e.g., Peretz v. United* States, 501 U.S. 923, 936 (1991) (citing cases), and in civil cases. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717 (1986). Indeed, arbitration agreements, like the one in this case, could not be formed in the first place if the parties were disabled from waiving procedural rights like the right to trial by jury or the right to proceed in a judicial forum. Thus, "absent some affirmative indication of Congress' intent to preclude waiver, [the Court has] presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995).

As the above quotation indicates, the presumption is not irrebutable: a waiver may be held invalid if "it is inconsistent with the provision creating the right sought to be secured." *Hill*, 528 U.S. at 116. But inconsistency is not to be lightly found. Before a

court nullifies a contractual promise as incompatible with a particular policy, "the interest in its enforcement [must be] outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), citing *Restatement (Second) of Contracts* § 178. Furthermore, the "public policy . . . must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W. R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (internal quotation marks omitted).

**II.** The Second Circuit should have enforced the agreed-upon class action waiver in this case. Although the court found that the waiver agreement was in conflict with the policies—though not any specific text—of the federal antitrust laws, it made no attempt to assess all of the relevant statutory interests. To the contrary, it steadfastly looked at just one side of the equation, finding only that class actions could serve a beneficial purpose by allowing private prosecution of otherwise non-viable antitrust claims. It thus ended its analysis of antitrust policy without weighing, or even considering, the potential negative effects of class actions on antitrust objectives.

That omission is a critical one, because the negative effects can be significant. As this Court has observed, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008). That risk of extorted settlements is

exponentially magnified in situations, like the one here, where the plaintiffs, rather than proceeding individually, are assembled into a class numbering thousands (or sometimes even millions) of members. The effect of such aggregation—indeed, in many cases, its purpose—is to inflate the possible damage award into a potentially ruinous figure. Faced with such stakes, businesses may ultimately choose to acquiesce in a forced settlement "at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merits of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002).

This magnification of litigation risk is a serious concern in any case. But businesses are especially vulnerable to the coercive effects of class actions in circumstances where the grounds for liability are difficult to predict in advance. Tying law—the basis of respondents' claim here—presents a ready example. The practice of combining products into a single sale is an extremely common one, even in fully competitive industries, yet the standards for determining which combinations are lawful remain uncertain. As matters now stand, tying arrangements may be judged under a per se rule, a quasi per se rule, or a rule of reason. *See, e.g., Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Moreover, the relevant analysis requires difficult inquiries into whether the business has tied together separate products and whether it possesses market power in the tying product market. Businesses thus must make educated guesses about when tying will be permitted, with class actions greatly increasing the penalty for guessing incorrectly.

Antitrust goals are plainly impeded, not fostered, if businesses choose to avoid desirable product combinations out of fears about potentially calamitous judgments. Numerous commentators have pointed out that tying can offer considerable benefits to consumers. *See, e.g.*, Evans & Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73 (2005). For example, offering two products only in combination can provide customer convenience and can lower marginal costs of production, packaging costs, delivery and other transaction costs, and costs of dealing with product complexity. *See id.* at 90-91. Other benefits can include efficient quality control and economies of scale easing entry into a tied product market. *See* 10 P. Areeda, H. Hovenkamp & E. Elhauge, *Antitrust Law* ¶¶ 1761-1764e, at 357-98 (2d ed. 2004). Yet, those benefits are necessarily diminished whenever businesses alter their decision-making in an attempt to minimize exposure to large unpredictable judgments.

The Second Circuit rested its decision primarily on a concern that, if class action waivers are honored, some low-recovery, high-cost private antitrust claims will not be brought at all. But the antitrust laws do not embody a determination that private suits should proceed regardless of the potential benefits and costs. Indeed, unlike many federal statutes, the antitrust laws make no provision for reimbursement of expert costs, an omission that necessarily reflects congressional acceptance that the pursuit of some claims will be financially impractical. Furthermore, an individual's decision to forgo an antitrust lawsuit because of its possible expense does not mean that the conduct at issue acquires immunity from regulation. Federal and state officials are free to seek civil and criminal

remedies if they regard the behavior as unlawful, and the antitrust laws specifically authorize state Attorneys General to bring *parens patriae* suits for treble damages. *See* 15 U.S.C. § 15e. There is thus no sound basis for concluding, as the Second Circuit did, that the antitrust laws embody so dominant a policy favoring class actions that competing interests in enforcing private agreements must give way.

**III.** The Second Circuit also should have paid more heed to the important role that class action waivers play in assuring the viability of arbitration as an alternative forum for resolution of small disputes. As the court of appeals correctly observed, federal law generally requires that arbitration agreements be enforced. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985). Yet, without the parties' ability to agree on class action waivers, at least two impediments to traditional arbitration will arise. First, if the parties nonetheless proceed to arbitration on a class basis, arbitration proceedings will inevitably become more costly and complex, thereby losing much of their essential character as relatively simple mechanisms for disposing of claims. Second, the absence of class action waivers will often prompt businesses to abandon arbitration entirely, given the possibility of enormous financial exposure and the more limited judicial review afforded to arbitration awards. Whichever course is followed, the "national policy favoring arbitration" will be frustrated. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

## ARGUMENT

### I. CONTRACTUAL WAIVERS OF PROCEDURAL RIGHTS ARE PRESUMPTIVELY VALID.

More than a century ago, this Court set forth the basic principle that "[a] party may waive any provision, either of a contract or of a statute, intended for his benefit." *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872). Since then, the Court has, "in the context of a broad array of constitutional and statutory provisions," articulated a general rule that presumes the enforceability of waivers. *See Mezzanatto*, 513 U.S. at 200-01. "[A]bsent some affirmative indication of Congress' intent to preclude waiver, [the Court has] presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Id.* at 201. As a result, a party seeking to avoid the consequences of a contractual waiver bears the burden of establishing its invalidity. *See id.* at 200-01 ("[r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption").

This general rule, like most general rules, has an exception: "waiver is not appropriate when it is inconsistent with the provision creating the right sought to be secured." *Hill*, 528 U.S. at 116. But the standard for satisfying the exception is a demanding one. Under traditional common law principles, a contractual agreement is properly set aside only "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton*, 480 U.S. at 392, citing *Restatement (Second) of Contracts* § 178. That determination, in turn, requires "a careful

balancing, in the light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms." *Restatement (Second) of Contracts* § 178, Comment b. "Enforcement will be denied only if the factors that argue against enforcement clearly outweigh the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term." *Id.*

This Court has also made clear that, before a contractual promise can be invalidated on policy grounds, the "public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W.R. Grace*, 461 U.S. at 766, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945). In particular, a court may not disregard the parties' agreement just because the right being waived may, in some sense, serve a "public interest." Although the societal interest in enforcement of the right is properly considered as part of the balancing process, "[i]t is *not* true that any private right that also benefits society cannot be waived." *Hill*, 528 U.S. at 117. To the contrary, it is assumed that individual parties, by deciding whether or not to assert their rights, are well-positioned to reflect "broader social interests," *id.*, unless Congress has clearly indicated otherwise. *See, e.g., Cange v. Stotler and Co., Inc.*, 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring) ("[c]ontracts rarely defeat the function of a statute so utterly that they may be set aside"). This is especially so when the public's interest may be vindicated through other mechanisms, such as public enforcement. *See* page 18 *infra*.

Against this background, the Court has repeatedly enforced waivers of procedural rights, whether the rights were based in the Constitution or in a federal statute. *See, e.g., Mezzanatto*, 513 U.S. at 201 (citing cases). And it has done so even though the waived rights were of the highest order. Thus, in the criminal context, the Court has recognized that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *Id.* Similarly, it has held that waivers of statutory procedural rights are fully valid. *See, e.g., Hill*, 528 U.S. at 114-18 (waiver of time limits under the Interstate Agreement on Detainers). And, it has followed the same broad pro-waiver principle in civil cases, including, of course, cases involving the validity of arbitration agreements themselves. *See, e.g., Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 24-35 (1991) (party may waive right to judicial forum under the Age Discrimination in Employment Act); *Jeff D.*, 475 U.S. at 730-38 (party may waive statutory entitlement to attorneys' fees); *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 175, 185 (1972) (party may waive right to statutory notice); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S 311, 315-16 (1964) ("parties to a contract may agree in advance" to waive various procedural rights).

## II. THE ANTITRUST LAWS DO NOT AFFIRMATIVELY PRECLUDE WAIVERS OF CLASS ACTIONS.

**A.** The federal antitrust laws[2] do not contain an "affirmative indication of Congress' intent to preclude

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[2] The Second Circuit did not distinguish among the various antitrust statutes, evidently assuming that a waiver of class

waiver" of antitrust class actions, *see Mezzanatto*, 513 U.S. at 201, even for otherwise non-viable private claims. To begin with, nothing in the text of the relevant antitrust laws forbids waiver of rights granted by those statutes.[3] Furthermore, the language of the antitrust laws is silent with respect to class actions, neither endorsing them nor prohibiting them. In fact, as petitioners have pointed out, *see* Pet. 16-17, Congress, in enacting the Sherman Act, specifically rejected a proposal to supplement its substantive prohibitions with a provision authorizing consumers to bring class actions for damages. *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

It is true, of course, that, decades after Congress decided against providing for class actions in the Sherman Act, Rule 23 of the Federal Rules of Civil Procedure specifically authorized broad damages class actions, thereby allowing many plaintiffs the opportunity to pursue low-value claims. *See* Fed. R. Civ. P. 23(b)(3). But Rule 23 only allows for class actions: it does not bar agreements to forgo that procedural device. Furthermore, it is a considerable leap for a court to conclude, as the Second Circuit implicitly did, that an individual's agreement to waive a procedural right set forth in one law so

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actions would present the same concerns under the Sherman Act, Clayton Act, or the Federal Trade Commission Act. Unless otherwise indicated, we likewise use the term "antitrust laws" to refer to those laws collectively.

[3] This lack of express prohibition, while not by itself determinative, stands in marked contrast to the treatment of waivers under the securities laws, which explicitly bar them. *See* 15 U.S.C. § 77n (1982); 15 U.S.C. § 78cc(a) (1982) *See also Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987).

undermines the substantive policy of an entirely different set of laws that the agreement must be deemed unenforceable. At a minimum, the court must take pains to assure that the substantive interests served by preserving the procedural right definitively outweigh the interests served by respecting its waiver. When that burden is not met—and it is not here, *see* pages 12-19 *infra*—then the usual rule permitting waiver should apply.

**B.** The Second Circuit struck down the class action waiver in this case because it treated the waiver as functionally equivalent to a waiver of the right to remedy antitrust violations at all. *See* Pet. App. 39a (enforcement of the waiver "would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery"). Following that line of analysis, it then placed great weight on decisions of this Court that have indicated that a prospective waiver of substantive rights (*e.g.*, the right to seek any redress for violation of a particular law) is contrary to statutory policy. *See* Pet. App. 37a-39a; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322, 329 (1955).[4] But the two situations are not the same. It may well be that a prospective waiver of the right to sue at all would be "inconsistent with the provision creating the right[s] sought to

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[4] The agreement in *Mitsubishi* did not expressly waive the right to sue under the federal antitrust laws. But the Court considered the possibility that the agreement's choice of forum and choice of law provisions might operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations . . . ," finding that such a waiver would be "against public policy." 473 U.S. at 637 n.19.

be secured," *Hill*, 528 U.S. at 116, given that Congress had authorized private suits in the statute. It does not necessarily follow, however, that Congress, merely by providing for a cause of action, also intended to preserve an unwaivable "right" to pursue that cause of action by all possible means, even if those means are not mentioned in the relevant statutes, did not exist (in the form now authorized by Rule 23(b)(3)), and might, in fact, prove harmful to the statutory aims. The latter situation brings fundamentally different policy choices into play.

The Second Circuit, however, gave only a cursory look at the overall impact of class actions on antitrust policy. Although it acknowledged that the right to bring a class action might be regarded as "'a procedural right only, ancillary to the litigation of substantive claims,'" Pet. App. 22a, quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), it went on to emphasize that this Court had "repeatedly recognized the utility of the class action as a vehicle for vindicating statutory rights." Pet. App. 23a. But that observation, by itself, proves little: the fact that a procedural right has "utility" for vindicating other rights clearly does not mean that parties are unable to waive it. For example, no one doubts that the right to counsel is enormously helpful to criminal defendants in vindicating a number of other statutory and constitutional rights—indeed, may make the difference between a defendant's conviction or acquittal—but it has long been accepted that defendants may elect to waive the right to counsel. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

It is thus incorrect to conclude that class actions are critical to antitrust policy, and not subject to waiver, simply because class actions would allow some

antitrust plaintiffs to bring otherwise financially-barred claims. After all, as this Court has recently pointed out, private lawsuits against businesses have costs as well as benefits: while they may provide redress for injured parties with meritorious claims, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Investment Partners*, 128 S. Ct. at 772, citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975). Even some individual suits, therefore, can exact a price that is out of keeping with overall statutory goals.

This potential for exploitation of weak claims, of course, increases dramatically in large-scale class actions. The Fifth Circuit has stated, in the context of mass tort cases, that "class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). *See* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 8-9 (1971). Likewise, the Seventh Circuit has expressed concern that enormous class claims may induce settlement "at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merits of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1015-16. The Third Circuit, too, has emphasized the significant distortion that class actions may cause with respect to business decision-making. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir 2002) (class suits "place[] inordinate or hydraulic pressure on defen-

dants to settle, avoiding the risk, however small, of potentially ruinous liability"). In the end, many of these costs imposed on businesses will be borne by consumers in the form of higher prices. *See* Handler, at 10.

The exposure to potentially crushing liability increases still further when the standards for liability are unclear or in flux. This Court has observed that "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct," *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-41 (1978), a wide-ranging observation that is particularly apt when applied to tying law. *See* 9 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1701d, at 24 (2d ed. 2004) ("[t]ying law remains in a confused state"). Indeed, it is not even clear ex ante what test will be employed to determine the legality of particular tying arrangements, with the choices ranging from a strict per se rule to a quasi per se rule to a rule of reason, depending on the circumstances. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) ("[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'"); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 592 n.2 (1st Cir. 1993) (Boudin, J.) ("Tying is sometimes described as a per se offense but, since some element of power must be shown and defenses are effectively available, 'quasi' per se might be a better label"); *Microsoft Corp.*, 253 F.3d at 94 ("We remand the case for evaluation of Microsoft's tying arrangements under the rule of reason").

Even putting aside questions about the applicable standard, it can be difficult for businesses to identify where the line between lawful and unlawful tying arrangements might be drawn. For example, it is generally accepted that, regardless of what standard is ultimately used, a business is not subject to liability unless it has tied together separate products. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461-62 (1992). But "[w]hen a bundle constitutes separate products rather than a single product is often unclear . . . . The problem is pervasive because just about any product could be described as a tie of its components." 10 P. Areeda, H. Hovenkamp & E. Elhauge, *Antitrust Law* Ch. 17D-1, at 151 (2d ed. 2004). Moreover, tying analysis calls for an evaluation of whether the business offering two products in combination has power in the market for the tying product. *See Illinois Tool Works*, 547 U.S. at 35. Yet, the dual tasks of defining the relevant market, and determining the extent of power over it, present their own considerable uncertainties. *See, e.g., Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 486 n.24 (3d Cir. 1992) ("in practice, although economists use indices, market power is difficult to measure with precision"); *see also Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000).

It is no comfort that businesses might avoid liability simply by not combining products in the first place. Apart from the fact that this would be an impossible practice to follow—cars come with windows, etc. (*see* Evans & Padilla at 90)—that kind of overly cautious conduct would impede, not promote, antitrust policy. The fact that "tying is common in competitive markets," Evans & Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive*

*Markets and Implications for Tying Law*, 22 Yale J. Reg. 37, 40, 83 (2005), demonstrates that tying, far from routinely harming consumers, widely carries efficiency benefits. *See* R. Posner, *Antitrust Law* 253 (2d ed. 2001) ("widespread use [of a practice] implies that it has significant economizing properties"). For example, the practice of offering two or more products only in combination may provide convenience for consumers and lower costs for producers. *See* Evans & Salinger, at 43, 52; Evans & Padilla, at 90-91; Hylton & Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469 (2001). It may also allow more efficient quality control and economies of scale easing entry into a tied product market. *See* 10 *Antitrust Law* ¶¶ 1761-1764e, at 357-98.

These efficiency benefits will be forfeited if businesses—fearing massive, unpredictable judgments—choose to avoid otherwise advantageous product combinations. As this Court has noted with respect to antitrust criminal liability, overdeterrence comes at a significant cost: "salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." *U.S. Gypsum*, 438 U.S. at 441. That concern, applicable to a broad range of antitrust claims, applies with full force here.

**C.** Despite the Second Circuit's worry about respondents' practical inability to bring their claims, the antitrust laws do not embody an overriding policy that favors the private prosecution of all damage claims regardless of cost. While the Clayton Act

authorizes private suits, *see* 15 U.S.C. § 15(a), and provides for an award of attorneys' fees, *see id.*, it does not—unlike many other federal statutes, *see West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 88-89 (1991)—make any allowance for reimbursement of expert fees. Thus, notwithstanding the fact that proving an antitrust violation typically involves reliance on expert testimony, Congress, by declining to authorize reimbursement, necessarily has accepted that some potential litigants will be deterred by the prospect of incurring unrecoverable expert fees. In that regard, of course, antitrust plaintiffs are simply treated in the same manner as most litigants, who must weigh the potential rewards of bringing suit against the foreseeable expense of going forward.

Furthermore, it is not the case that a decision to forgo certain means of private enforcement results in de facto immunity for unlawful conduct. The Justice Department, of course, not only may secure injunctive and other relief for violations of the Sherman Act, *see* 15 U.S.C. § 4, but may seek criminal sanctions as well. *See* 15 U.S.C. §§ 1-3. Likewise, the Federal Trade Commission has authority to proceed against "unfair methods of competition." *See* 15 U.S.C. § 45. And, as an alternative to private class actions, Congress has expressly provided that state Attorneys General may bring suits, in their *parens patriae* capacity, on behalf of "natural persons" and obtain "as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15c(a)(2).

All in all, therefore, the Second Circuit was wrong to conclude that a waiver of class actions is antithetical to the substantive policies of the federal

antitrust laws. Judicial respect for voluntary waivers ultimately rests on an understanding that waivers do not simply result in a "loss" of rights, but rather can advance important positive objectives. Here, a more complete examination of class actions' effects on antitrust policy shows that, while class actions may sometimes promote antitrust goals, they also may threaten, and thereby inhibit, lawful, economically beneficial conduct. Given that mixed picture, it cannot be said that antitrust policy affirmatively requires that plaintiffs be allowed to bring class actions, despite their express agreements not to do so. The presumption in favor of honoring waiver agreements should apply. *See Mezzanatto*, 513 U.S. at 201.

## III. A JUDICIAL REFUSAL TO ENFORCE CLASS ACTION WAIVERS WILL IMPEDE THE FEDERAL POLICY FAVORING ARBITRATION.

The Second Circuit's decision also places significant practical limitations on the availability of arbitration as an alternative forum for dispute resolution. This Court has recognized that "Congress enacted the [Federal Arbitration Act] '[t]o overcome judicial resistance to arbitration,' *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), and to declare '"a national policy favoring arbitration" of claims that parties contract to settle in that manner,' *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984))." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271 (2009). Thus, federal law generally requires enforcement of voluntary arbitration agreements. *See Dean Witter Reynolds*, 470 U.S. at 220. Here, although the court of appeals did not invalidate the

underlying agreement to arbitrate, its holding that class action waivers in such agreements are unenforceable, at least for low-value, high-cost antitrust claims, will nonetheless have several negative effects on federal arbitration policy.

First of all, even if parties to an arbitration agreement decide to proceed with arbitration on a class basis, many of the anticipated benefits of arbitration as a convenient forum will be lost, both for businesses and for their customers. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280 (1995) ("Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind"). In *Allied-Bruce Terminix*, this Court noted that "'[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . .'" 513 U.S. at 280 (quoting H.R. Rep. No. 97-542, 97 Cong., 2d Sess. 13 (1982)). Class actions inevitably will eliminate many of those stated advantages, turning simple arbitration into something far more complicated and adversarial. The informality of dealing with individual customers to resolve concrete disputes will be supplanted by the complexity of addressing the aggregated grievances of a class with thousands of unseen members.

Even more serious is the prospect that, absent enforceable class action waivers, many otherwise arbitrable claims will simply wind up in court. One recognized advantage of arbitration is that it is more likely to achieve a final resolution of the particular

dispute between the parties, because of strict statutory limitations on the scope of subsequent judicial review. *See* 9 U.S.C. §§ 10-11. Indeed, this Court recently reaffirmed that the Federal Arbitration Act reflects "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Assoc. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008). In keeping with that policy, the Court made clear that the statutory grounds for review of arbitration awards are both narrow and exclusive. *See id.*

That circumscribed review of arbitration awards is entirely appropriate when the arbitration is an individual one, with reasonably quantifiable risks. But the normal calculus is severely distorted if the outcome of arbitration may be a potentially enormous class judgment. As we have discussed, *see* pages 14-15 *supra*, the pressure on businesses to settle class actions is already out of proportion to the likely worth of the claims—meritorious or not—and that pressure can only be increased by the possibility of huge, yet largely unreviewable, awards. For many businesses, therefore, the safer course will be to bypass arbitration altogether. In fact, it is now common for arbitration agreements to specify that, if the class action waiver is deemed unenforceable, then the arbitration agreement itself must be considered void. *See, e.g., Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 986 (9th Cir. 2007).

Given that agreements to arbitrate may stand or fall depending upon the enforceability of class action waivers, it seems unavoidable that questions about the validity of such waivers will produce great uncertainty and delay. First of all, the parties may need to

litigate whether the plaintiff's claim could feasibly be brought on a non-class basis, in which case the Second Circuit's rule against enforceability of the class action waiver would not apply. Moreover, the fact that certain plaintiffs wish to proceed as a class does not mean that they have an automatic "right" to do so: to be certified, a class must meet applicable standards, such as those in Rule 23. As a result, parties to an arbitration agreement will have to argue over the plaintiffs' entitlement to class status—an often drawn-out determination that is, in any event, not final, but subject to later amendment (*see* Fed. R. Civ. P. 23(d)(2))—before learning whether the substantive claims are arbitrable in the first place. If the case is eventually found unsuitable for class treatment, the parties then will wind up before an arbitrator just as they had originally agreed, but only after the expenditure of considerable time and resources, all resulting from resolution of an ancillary issue that has nothing to do with the merits of the dispute between them.

Attacks on class action waivers thus present a challenge to the effectiveness of arbitration agreements themselves. If class action waivers are routinely held unenforceable, it may be expected that plaintiffs' lawyers will seek, where possible, to frustrate the purpose of arbitration agreements by bringing claims on a class basis. The decision below, therefore, not only reflects a serious overreading of the antitrust laws' preclusive effect on contractual waivers, but also poses a substantial threat to the "national policy favoring arbitration." *Southland Corp.*, 465 U.S. at 10. The Court should grant certiorari to review it.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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